THE LAW

OF THE

CANADIAN CONSTITUTION

BY

W. H. P. CLEMENT, B.A., LL.B., (TOR.)

FORMERLY OF OSGOODE HALL, BARRISTER-AT-LAW
NOW OF THE BAR OF BRITISH COLUMBIA.

SECOND EDITION

TORONTO:
THE CARSWELL COMPANY, LIMITED,
1904.

Entered according to the Act of the Parliament of Canada, in the year one thousand nine hundred and four, by THE CARSWELL COMPANY, LIMITED, in the Office of the Minister of Agriculture.

PRINTED BY
THE CARSWELL CO., LIMITED
30 ADELAIDE ST. EAST,
TORONTO.

CONTENTS.

PREFACE.

This edition was undertaken as an attempt to bring the work up to date. The result is that the book has been entirely recast 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 B. N. A. Act."

W. H. P. CLEMENT.

28th Nov., 1903.

TABLE OF CASES CITED.

G.

H.

M.

Mc.

S.

T.

U.

TABLE OF REFERENCES TO B. N. A. ACT, 1867.

GENERAL REFERENCES—See Index, "B. N. A. Act, 1867."
object and effect of Act, 1, 138.
interpretation of, as a "constitutional" Act, 69.
in the light of history, 71.
Quebec Resolutions, 72.
pre-confederation laws, 239-40, 263.
United States decisions, 73, 173.
framework of, in view of decision of (old) Canada, 136, 144.
executive authority—See "Crown."
distribution of legislative power under, 160 *et seq.*
division of assets, 326 *et seq.*
admission of other B. N. A. colonies, 350 *et seq.*

Preamble—(Notes)	69-74	(other references)	16, 23, 60, 77.	
Sec. 1 — "	75-6	(other references)	78.	
" 2 — "	76			
" 3 — "	77.			
" 4 — "	78			
" 5 — "	78			
" 6 — "	78-9	(other references)	136.	
" 7 — "	79			
" 8 — "	79	(other references)	207-8.	
" 9 — "	79-92	(other references)	61, 101, 137, 140, 144, 147, 154, 162, 209, 261, 282, 297, 298.	
" 10 — "	92-99	"	91	
" 11 — "	99	"	91, 95, 97.	
" 12 — "	100-2	"	144.	
" 13 — "	102.			
" 14 — "	102-3	(other references)	97, 145.	
" 15 — "	103	"	208.	
" 16 — "	103.			
" 17 — "	103-4	"	147.	
" 18 — "	104-10	"	75, 103, 148, 250.	
" 19 — "	110.			
" 20 — "	110	"	98, 152.	
" 21 — "	111-3	"	117, 120, 364.	
" 22 — "	113-4	"	112.	
" 23 — "	114.			

[N.B.—For convenience of reference, and comparison, sections 91 and 92 are printed in their entirety side by side on pp. 160 and 161.]

THE LAW OF THE CANADIAN CONSTITUTION

CHAPTER I.

PRE-CONFEDERATION CONSTITUTIONS.

The Dominion of Canada looks for its constitution to the "British North America Act, 1867."[1] Since the 1st day of July in that year Canada's form of government has been, under that Act, a general[2] Dominion government charged with matters of common interest to the whole country and local[2] provincial governments charged with the control of local matters in their respective sections. The constitution of these governments is provided for in the Act, and the sphere of political activity assigned to each carefully mapped out.

"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

[1] 30 & 31 Vict. c. 3 (Imp.).

[2] These are the distinguishing words used throughout the Quebec Resolutions upon which the B. N. A. Act—to use the common abbreviation—is based. See Appendix A.

performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government." [3]

If the B. N. A. Act were the creation of 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, and it will be necessary, therefore, to examine the earlier provincial constitutions. Indeed, it will appear that in at least two, New Brunswick and Nova Scotia,[4] the governmental machinery was left almost intact; new provision was made only for the Dominion government and the provinces of Ontario and Quebec.[5] In any case a short historical retrospect will probably not be out of order.

With the view, then, to determine the nature of the constitution of government in the various provinces of which the Dominion is composed, it is proposed to discuss briefly, and so far only as is necessary to a proper appreciation of our present system, the constitutional history of those provinces.

To Nova Scotia belongs the distinction of being the oldest of the B. N. A. colonies now forming part of the Dominion. The preamble to one of the earliest Acts of the Nova Scotia Assembly (1759) 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 possession."[6] 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 Acadia, with its ancient boundaries," was ceded by France to the Crown of England in the most ample terms of renunciation. Nova Scotia, as thus ceded, included the present

[3] Liquidators of Mar. Bank v. Rec.-Gen'l of N. B. (1892) A. C. 437; 61 L. J. P. C. 75; 5 Cart. 1.

[4] The same remark applies to British Columbia and Prince Edward Island upon their admission to the Dominion.

[5] And afterwards for Manitoba and the North-West Territories.

[6] 33 Geo. II. c. 3 (N. S.).

provinces of Nova Scotia (excluding Cape Breton) and New Brunswick, and also 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 to Governor Cornwallis authorized the summoning of "general assemblys of the free-holders 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 on the second of October, 1758, at Halifax.

In 1763, the remaining portions of what are now known as the Maritime Provinces—Cape Breton and Prince Edward Island—were, by the treaty of Paris, ceded to Great Britain; and, by the proclamation which followed, were annexed "to our government of Nova Scotia."

Six years later, PRINCE EDWARD ISLAND was made a separate province under a governor of its own, and his commission, also, authorized the calling together of "general assemblys of the free-holders and planters within your government, in such manner as you in your discretion shall judge most proper," and according to further instructions. The first parliament of Prince Edward Island met in 1773.

In 1784, NEW BRUNSWICK was made a separate province, and the commission of its first governor authorized, in somewhat similar phraseology, the summoning of a general assembly, which shortly thereafter met.

Of CAPE BRETON'S constitutional vicissitudes it is unnecessary to make mention.[7] Finally, in 1820, it was re-annexed to the government of Nova Scotia, of which province it has ever since formed, and now forms, part.

[7] They are set out at length in 5 Moo. P. C. 259: *In re* The Island of Cape Breton.

So far as the Maritime Provinces[8] are concerned, their legislatures of to-day are the lineal descendants of those early "general assemblys."

QUEBEC — not the present province of that name, but practically the now provinces of Quebec and Ontario—was ceded to Great Britain by the same treaty of Paris which secured Cape Breton and Prince Edward Island. The proclamation[9] which followed upon the cession simply annexed Cape Breton and Prince Edward Island to the government of Nova Scotia, but erected Quebec into a new province and made provision for its government. Both by that proclamation and by the commission to Governor Murray the institution of a representative assembly was contemplated, but, for reasons upon which it is unnecessary to enlarge, no such assembly ever met thereunder. Not until after the passage of what is known as "The Constitutional Act, 1791,"[10] dividing Quebec into the two provinces of Upper and Lower Canada and providing for a separate legislature in each province, did such assemblies meet; that of Upper Canada at Niagara, on the 17th of September, 1792, and that of Lower Canada at Quebec, a few months later. In 1840, the two provinces of Upper and Lower Canada were, by what is commonly known as "The Union Act,"[1] joined together in a legislative union which lasted until the birth of the Dominion.

In taking a comprehensive view of the nature of the government which was established in the various provinces, it will be convenient to confine our attention, in the first place, to the constitutions established by royal prerogative[2] in the Maritime Provinces, and to treat later of the statutory constitutions of the Upper Provinces.

This survey is undertaken in order to show that prior to the date of Confederation the Imperial government had in

[8] The documents relating to the early constitutions of the Maritime Provinces are set out in Return No. 70, Can. Sess. Papers, 1883.

[9] See *Houston*, Constitutional Documents of Canada, p. 67.

[10] 31 Geo. III. c. 31 (Imp.); see *post*, p. 9.

[1] 3 & 4 Vic. c. 35 (Imp.).

[2] See Phillips v. Eyre, (1870) L. R. 6 Q. B. 20; 40 L. J. Q. B. 28, as to the powers of the Crown in this connection.

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 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.[3] Shortly stated, it was effected by the judicious use of the Commons' control over the purse strings 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 Plantations." The very facts above alluded to—that for very many years after the settlement of Nova Scotia (practically until the B. N. A. Act) no legislative interference by the Imperial

[3] See *May's* Const. Hist.

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,[4] 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,[5] 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.[6]

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 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

[4] Campbell v. Hall, Cowp. 204; relating to Grenada.

[5] This was one of the prerogatives annexed to the Crown as commander-in-chief—a right arising by conquest.

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

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.[1] "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 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."

[1] *Houston*, Const. Documents, p. 9.

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 should 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."[8]

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.

[8] Compare *Chitty*, "Prerog. of the Crown" p. 3, quoted *post*, p. 133.

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,"[9] 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 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.[10]

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 to the legislature no larger measure of control over the executive than had been conferred on the assemblies in the Maritime Provinces.[1]

[9] 14 Geo. III. c. 83.

[10] 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. See the Act; *Houston*, Const. Doc. p. 97. It is referred to *post*, p. 13.

[1] But see *post*, p. 13.

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;[2] 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 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 a matter of perfect 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 Imperial trade and commerce. At first the expense of governing the colonies was borne entirely by the home government, but as early as 1672[3] 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."

[2] Exchange Bank v. Reg., 11 App. Cas. 157; 55 L. J. P. C. 5. See notes to s. 9 of the B. N. A. Act, *post*, p. 86.

[3] 25 Car. II. c. 7.

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 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,[4] 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 Imperial 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 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

[4] 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.

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.[5]

[5] *J. G. Bourinot*, "Responsible Government in Canada"—a paper read before the National Club, Toronto, during the winter of 1890-91, and published sub-tit. "Maple Leaves," p. 43.

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,[6]—a *revenue* Act; 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.[7]

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 "family-compact" 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

[6] See note, *ante*, p. 9.

[7] 1 & 2 Wm. IV. c. 23. See *Houston* "Const. Doc." p. 106; Andrew v. White, 18 U. C. Q. B. 170.

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[8] appears in Acts relating to colonial control of colonial finances,—the "tenure of office" question appearing only in the "conventional" aspect of 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; 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 B. N. A. Act may now, perhaps, be defined with some approach to accuracy. What Lieut.-Gov. Archibald has said[9] 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."

[8] 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 Ont., 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.*

[9] Can. Sess. Papers, 1883, No. 70.

In (old) Canada the form of government was prescribed by the Act of Union.[10] 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 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. The "conventions of the constitution" 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.[1]

Of the causes which led to the adoption by the provinces of the Quebec Resolutions, upon which the B. N. A. 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. It may, therefore, be unhesitatingly affirmed of both the Dominion and the provincial governments that "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."[2]

[10] 3 & 4 Vic. c. 35 (Imp.).

[1] Extracts from the despatches from the Col. Secy. to Lord Sydenham are given in the author's "Hist. of Canada," at p. 248. See also *post*, p. 99.

[2] *Bourinot* "Maple Leaves," p. 37; see note *ante*, p. 12.

CHAPTER II.

A COMPARATIVE EXAMINATION.

The preamble to the B. N. A. 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 B. N. A. 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 B. N. A. provinces is federal, indicating, *ex necessitate,* some sort of a 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 neighboring Republic are sufficient to stamp them as essentially alike. A closer examination of the B. N. A. Act itself,

[1] In the Quebec Resolutions; see Appendix A.

[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.

coupled with some slight knowledge 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 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 constitution, 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. 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. 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 neighboring 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,[3] 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.[4]

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 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

[3] See *post*, p. 57, *et seq.*

[4] Campbell v. Hall, Cowp. 209; and see Lenoir v. Ritchie, 3 S. C. R. 575, 1 Cart. 488.

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 cooperation 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[5] 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:

"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

[5] *E.g. Chitty*, "On the Prerogatives of the Crown," at p. 2.

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:[6]

"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,

[6] *Prof. Woodrow Wilson*, "Congressional Government," 4th ed., p 307. See, however, a criticism of this work in "Essays on Government" (*A. Lawrence Lowell*), p. 46 *et seq.*

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."

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,[1] 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,

[1] Art. 1., s. 6.

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 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:[8]

"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 Monarchial governments, but between Congressional and Parliamentary governments. Congressional government is *Committee* gov-

[8] Congressional Government, p. 283.

ernment; 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."

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 B. N. A. Act is strictly accurate.

To any one who has knowledge of the constitutions of the provinces prior to Confederation,[9] 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 B. N. A. Act, the sum total of our rights of self-government has been lessened. 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 a 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

[9] See Chap. I., *ante*.

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[10]—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 Mr. Dicey—the supremacy of parliament—as clearly appears here as in the United Kingdom; while, for the "conventional" aspect of 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.

[10] See *e.g.*, Bank of Toronto v. Lambe, 12 App. Cas. 587; 56 L. J. P. C. 87; 4 Cart. 7.

CHAPTER III.

WHAT IMPERIAL ACTS AFFECT A COLONY?

The subject divides itself into two branches:—

(1) Imperial Acts which extend to a colony because made applicable to such colony by express words or necessary intendment;

(2) Imperial Acts which, as part of the law of England, have been carried to a colony by its first settlers or which by the action of the Home authorities or by colonial adoption have been established as the basic law of the colony.

An Imperial statute of the first class, whatever its date, is in force in a colony *proprio vigore* as an enactment of the sovereign legislature of the Empire; it cannot be repealed or amended by the colonial legislature; and any colonial legislation repugnant to it is, to the extent of such repugnancy, absolutely void and inoperative.

Imperial statutes of the second class are necessarily of date anterior to the introduction of English law into the colony, and are in force only by the sufferance of the colonial legislature, which may repeal or amend them (so far as relates to their colonial operation) either directly or by repugnant legislation.

---

(1) *Imperial Acts which extend to a colony because made applicable to such colony by express words or necessary intendment.*

For the whole British Empire legislative sovereignty resides in the parliament of the United Kingdom.[1] No power,

[1] Reg. v. Marais, (1902) A. C. 51; 71 L. J. P. C. 32; Algoma Central Ry. Co. v. Reg. (1902) 7 Exch. Ct. R. 239; New Zealand Loan Co. v. Morrison, (1898) A. C. 349; 67 L. J. P. C. 10; Metherell v. Coll. of Phys., (1892) 2 B. C. 189; Callender v. Col. Secy. Lagos, (1891) A. C. 460; 60 L. J. P. C. 33; *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; Routledge v. Low, (1868) L. R. 3 E. & I. App. 113; 37 L. J. Chy. 454; Craw v. Ramsay, Vaugh. 292.

not even its own,[2] can tie its hands; no court within the Empire can pronounce its Acts *ultra vires*.[3] *Prima facie*, indeed, its enactments are for the United Kingdom only,[4] but as a mere question of power it may legislate for the colonies either generally or in particular to whatever extent it may think proper.[5] It may even extend its legislation to foreigners and foreign property beyond the bounds of the Empire and to acts committed abroad.[6]

The British parliament has often affirmed its legislative supremacy over the colonies, both by direct declaration[7] and by statutes making void repugnant colonial legislation.[8] Apart from legislative affirmance, however, the principle is now thoroughly established in the constitutional law of the Empire.

"How far the Imperial parliament should pass laws framed to operate directly in the colonies is a question of

[2] Auchterarder Case, Mac. & R. (H. L.) 238; Algoma Central Ry. Co. v. Reg., *ubi supra*.

[3] Cooke v. Chas. A. Vogeler Co., (1901) A. C. 102; 70 L. J. K. B. 181; 69 L. J. Q. B. 375; Colquhoun v. Brooks, (1888) L. R. 21 Q. B. D. 65; 57 L. J. Q. B. 439; Niboyet v. Niboyet, (1878) L. R. 4 P. D. 20; 48 L. J. P. 1; Reg. v. Keyn, (1876) L. R. 2 Ex. D. 152; 46 L. J. M. C. 17; Reg. v. Anderson, (1868) L. R. 1 C. C. R. 167; 38 L. J. M. C. 12.

[4] Reg. v. Jameson, (1896) 2 Q. B. 425; 65 L. J. M. C. 218; *Ex. p.* Pearson (1892) 2 Q. B. 263; 61 L. J. Q. B. 585; Colquhoun v. Brooks, *ubi supra; Ex p.* Blain (1879) L. R. 10 Chy. D. 522; Routledge v. Low, (1868) *ubi supra;* Brook v. Brook, (1860) 9 H. L. Cas. 193; Penley v. Beacon Ass'ce Co. (1864) 10 Grant. 428; Cope v. Doherty, (1858) 2 DeG. & J. 614; 27 L. J. Chy. 600; Jeffrey v. Boosey, (1855) 5 H. L. Cas. 815; 24 L. J. Ex. 81; Arnold v. Arnold, (1837) 2 My. & Cr. 256; 6 L. J. Chy. 218.

[5] Cases noted *ante*, p. 25.

[6] Extra-territorial imperial legislation must be discussed later in connection with the question as to the powers of colonial legislatures in this regard. See *post*, Chap. IV., p. 62, *et seq.*

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

[8] 7 & 8 Wm. III. c. 22; 6 Geo. IV. c. 114; 28-29 Vic. c. 63 (the Colonial Laws Validity Act, 1865; see Appendix B.). The only serious question raised has been as to the power of the British parliament to tax the internal trade of the colonies. By the celebrated Renunciation Act (18 Geo. III. c. 12), the Imperial parliament declared that it would not again attempt to do so. See note *ante*, p. 11.

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." [9]

It necessarily follows that any colonial legislation inconsistent with an Imperial statute extending to the colony must be inoperative. In the old colonial charters [10] and the earlier Constitution Acts for some of the colonies [1] the legislative power conferred was hedged about with some such proviso as that no law passed by the colonial assembly should be repugnant to the law of England,[2] and the earlier "repugnancy" Acts declared void "to all intents and purposes whatsoever" [3] 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,[4] and repugnancy in one portion even would render a whole Act void. To remove these difficulties the Colonial Laws Validity Act, 1865,[5] 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,

[9] *Per* Lord Hobhouse in Callender v. Col. Sec'y Lagos (1891) A. C. 460; 60 L. J. P. C. 33.

[10] See *ante*, p. 8; also *Egerton's* "Short Hist. of Brit. Col. Policy," pp. 17, 27, etc.

[1] *E.g.*, 5 & 6 Vic. 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 Vic. c. 35.

[2] 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.

[3] 7 & 8 Wm. III. c. 22; 6 Geo. IV. c. 114.

[4] 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*).

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

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 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,[6] and (2) a colonial Act repugnant in part only is to be void "to the extent of such repugnancy and not otherwise." A colonial legislature, therefore, may legislate upon the subject matters of Imperial statutes which extend to the colony so long as the colonial Acts are not inconsistent with the Imperial.[7]

The Colonial Laws Validity Act also lays down[8] the rule of interpretation now to be applied in determining whether or not any given Imperial Act extends by its own inherent force to a colony. It must be "made applicable to such colony by the express words or necessary intendment" of the Act itself or of some other Imperial Act. These words, however, would seem to be declaratory merely. The authorities before the Act lay down the same rule as do those since the Act.

It is beyond the scope of this work to enumerate the various Imperial Acts which extend to Canada. A brief review of the authorities upon some leading topics—copyright, bankruptcy, companies' Acts, and marriage—will suffice to indicate the leading principles of interpretation which have guided the courts of last resort in their decisions upon this subject.

[6] Phillips v. Eyre (1870) L. R. 6 Q. B. 20; 40 L. J. Q. B. 28; Reg. v. Marais, (1902) A. C. 51; 71 L. J. P. C. 32.

[7] 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.

[8] In s. 1; see Appendix B.

Imperial Copyright Legislation.

To what extent the Imperial Copyright Act of 1842 [9] was operative in Canada was considered by the House of Lords in 1868.[10] 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 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 [1] 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 [2] 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 involved a four-fold inquiry: To whom is this protection given—to a native born subject of the Crown wherever resident? to an alien friend sojourning in the United Kingdom? to an alien friend sojourning in a British colony? to an alien friend resident wholly abroad? It was unanimously held that an alien friend sojourning in any part of the Empire at the date of publication was entitled to the protection of the Act. It was not necessary to decide whether that protection extended to a British subject wherever resident and there was apparently some difference of opinion

[9] 5 & 6 Vic. c. 45.
[10] Routledge v. Low, L. R. 3 E. & I. App. 113; 37 L. J. Chy. 454.
[1] Section 29.
[2] Sections 15 and 29.

upon the point. There was a clear divergence of view as to the position of a foreigner resident abroad at the date of publication, but it was also unnecessary to determine that question. 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*[3] rested on the ground that the statute of Anne,[4] 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 authority 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.[5] 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 copyright in the United Kingdom. It is reasonable to infer that the persons thus

[3] (1855) 4 H. L. Cas. 815; 24 L. J. Ex. 81.
[4] 8 Anne c. 19.
[5] See cases noted *ante*, p. 26.

restrained were intended to have the same privileges as to works they might publish in the United Kingdom as authors actually resident therein. And, therefore, I have no hesitation in concurring with my noble and learned friend (Lord Cairns) in thinking that the decree was right. I find it difficult to concur with him in the opinion that the present statute extends its protection to foreigners."—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 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.

The question was afterwards litigated in Canadian Courts[6] 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.[7]

Imperial Bankruptcy Acts.

The extent to which these Acts are of colonial application has been recently 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.[8] 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

[6] Smiles v. Belford, 1 O. A. R. 436; 23 Grant 590; 1 Cart. 576.

[7] As to Canada's position under the B. N. A. Act, in reference particularly to Imperial Acts passed before 1867, see *post*, p. 37, *et seq.*

[8] Callender v. Col. Sec'y Lagos, (1891), A. C. 460; 60 L. J. P. C. 33.

bankrupt." There being thus no "express words," the question was whether there was the "necessary intendment" required by the Colonial Laws Validity Act.[9] 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[10] 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."

The natural result would follow[1] that the discharge of a bankrupt under the Imperial Act may be pleaded as a defence to an action in a colonial court.[2]

On the other hand, it has recently been held by the House of Lords[3] 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.[4]

[9] 28 & 29 Vic. c. 63 (Imp.); see Appendix B.

[10] The Act of 1849 had been held not to extend to New Zealand; Bunny v. Hart, 11 Moo. P. C. 189.

[1] See New Zealand Loan Co. v. Morrison, *infra*.

[2] 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.

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

[4] See Colquhoun v. Brooks, (1888) L. R. 21 Q. B. D. 65; 57 L. J. Q. B. 70, 439.

Imperial 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.[5]

"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 Acts to the colonies. It has been decided that by the express words[6] 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 in the latter

[5] New Zealand Loan Co. v. Morrison, (1898) A. C. 349; 67 L. J. P. C. 10.

[6] But see *ante*, p. 32.

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."—*Per* Lord Davey.

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.[7]

Marriage Acts.

For obvious reasons the Royal Marriage Act of George III.[8] was held to apply to all marriages wheresoever solemnized,[9] while the Act[10] prohibiting marriage with a deceased wife's sister 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 a Canadian case it was expressly held [2] not to be in force in Canada. "The colonies are not mentioned in the Act nor included by any necessary or even strong intendment." [3]

[7] Allen v. Hanson, (1890) 18 S. C. R. 667; 4 Cart. 470.

[8] 12 Geo. III. c. 11.

[9] Sussex Peerage Case, (1844) 11 Cl. & F. 146.

[10] 5 & 6 Wm. IV. c. 54 (commonly called Lord Lyndhurst's Marriage Act).

[1] Brook v. Brook, 9 H. L. Cas. 193.

[2] Hodgins v. McNeil, 9 Grant 305.

[3] For other cases involving enquiry whether or not some particular Imperial Act extends to Canada, see:

In re Lyons, 6 U. C. Q. B. (O.S.) 627—an Act respecting declarations in lieu of oaths.

Thompson v. Bennett, 22 U. C. P. 393—Orders in Lunacy.

Re Squier, 46 U. C. Q. B. 474—Removal of colonial officers.

Penley v. Beacon Ass'ce Co., 10 Grant 428—Action against shareholders.

Georgian Bay Trans. Co. v. Fisher, 5 O. A. R. 383—Merchants' Shipping Acts: see also The Rajah of Cochin, Swabey, 472.

Black v. Imp. Book Co., 5 O. L. R. 184. Copyright.

The Providence, Stewart (N.S. Adm.) 186—Navigation Act of Charles II.

A colonial legislature cannot repeal or amend Imperial Acts extending to a colony[4] unless empowered so to do by express permissive Imperial legislation.[5] 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,[6] 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 Vice-Admiralty Courts, a clearer view seems to have prevailed as to the

The Friend's Adventure, *ib.* 200; The Fama, *ib.* 112.
Congdon's N. S. Dig. col. 1336 *et seq.*
Stevens, N. B. Dig. sub-titl. "British Statute."

And for some cases involving the question of repugnancy between British and Canadian Statutes, see:

Reg. v. Annie Allen, 5 Ex. Ct. R. 144.
Reg. v. O'Dea, 3 Can. Crim. Cas. 402; 9 Que. Q. B. 158.
Reg. v. Sherman, 17 U. C. C. P. 167.
Reg. v. Slavin, *ib.* 205.
The Bermuda, Stewart (N. S. Adm.) 245—Prize Acts.
Merchants Bank v. Gillespie, 10 S. C. R. 312 (1885).
Algoma Central Ry. Co. v. Reg., (1902) 7 Ex. Ct. R. 239.
Reg. v. Coll. of Phys., 44 U. C. Q. B. 564; 1 Cart. 761.
Metherell v. Coll of Phys., 2 B. C. 189.
Atty.-Gen'l v. Flint, 16 S. C. R. 707; 4 Cart. 288.
The Farewell, 7 Q. L. R. 380; 2 Cart. 378.
Holmes v. Temple, 8 Q. L. R. 351; 2 Cart. 396.

[4] See cases in note *ante*, p. 25.

[5] *E.g.*, 9 & 10 Vic. c. 94, (empowering the colonies to repeal Imperial Tariff Acts), and the various Admiralty and Merchants' Shipping Acts: as to which last see Algoma Central Ry. Co. v. Reg., (1902) 7 Ex. Ct. Rep. 239. In his reference to The Royal, (1883) 9 Q. L. R. 148, Mr. *Lefroy* apparently overlooks the permissive sections of the Imperial Merchants' Shipping Acts of 1854; see his "Legislative Power in Canada," p. 212.

[6] 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.

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 to in preference to such Imperial Act.[7] But no judicial utterance supports such a view.

In a case[8] 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.[9] The Imperial "repugnancy" statute then in force[10] declared null and void to all intents and purposes 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

[7] The Bermuda, Stewart, 245.

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

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

[10] 6 Geo. IV. c. 114; passed, it will be noticed, after the Constitutional Act, 1791.

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[1] 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 B. N. A. Act became law. The word "exclusive" in the section (91) declaring the legislative power of the Dominion parliament has been adverted to[2] 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.[3] or the Colonial Laws Validity Act of 1865."[4] But this view has not met with support in later cases.[5] The same word occurs in section 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 B. N. A. Act, 1867, has so far modified the Colonial Laws Validity Act, 1865, in its application to Canada that Imperial

[1] 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.

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

[3] 18 Geo. III. c. 12. See *ante*, p. 11.

[4] See *ante*, p. 27-8. The Act is in the Appendix B.

[5] 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 v. McGuire (1878), 1 B. C. 107; Metherell v. Coll. of Phys. (1892), 2 B. C. 189; and see *Lefroy*, "Legislative Power in Canada," p. 210, *et seq*. 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.

Acts extending to Canada, but of date prior to 1867, may be, in effect, repealed or amended by Canadian legislation;[6] but this view has not met with favor at the hands of the Imperial law officers of the Crown,[7] and seems to be entirely opposed to the strong current of English and Canadian authority.

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[8] 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[9] holds that an amendment of an Imperial Act (extending to a colony) by a subsequent Imperial Act, not directly but by implication, is operative in such colony.

---

(2) *Imperial Acts which, as part of the law of England, have been carried to a colony by its first settlers, or which, by the action of the Home authorities or by colonial adoption, have been established as the basic law of the colony.*

This branch of the subject is concerned with Imperial Acts, and those only, which have no expressed reference to the colonies in general or to any colony in particular. To what extent are such Acts in force in a colony?

"A question of this kind," said Chief Justice Robinson,[10] "arising in any British colony, must depend upon the manner in which the law of England has become the law of that

[6] 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.

[7] *Ib.* See also Algoma Central Ry. Co. v. Reg. (1902), 7 Ex. Ct. Rep. 239.

[8] Bank of U. C. v. Bethune, 4 U. C. Q. B. (O.S.) 165.

[9] Reg. v. Mount, (1875) L. R. 6 P. C. 283; 44 L. J. P. C. 58.

[10] *Doe dem.* Anderson v. Todd, (1845) 2 U. C. Q. B. 82.

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 English 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 an Imperial Act.[1]

A brief review[2] of the authorities is attempted in order to arrive at the principles upon which they rest and not in order to indicate what particular Imperial Acts are to-day in force in the different Canadian provinces.

As to colonies acquired by settlement the law has been thus recently stated in the Transvaal Raid case:[3]

"Settlers from this country as a general proposition take with them as part of the law which is to govern them in their new home all the laws of the parent country[4] which are applicable and may reasonably be applied to the condition in which they exist. But the law may also be applied by the exercise of legislative power given to the governor of a new colony in any way he pleases within the limits of his authority."

[1] Falkland Islands Co. v. Reg., 2 Moo. P. C. (N.S.) 266; Harris v. Davis, 10 App. Cas. 259; 54 L. J. P. C. 15, etc., etc.

[2] In Appendix E will be found a tabulated list of English statutes as to which question has been raised in the courts.

[3] Reg. v. Jameson, (1896) 2 Q. B. 425; 65 L. J. M. C. 218. And see Kielley v. Carson, 4 Moo. P. C. 63.

[4] 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." He thought, however, that "Orders in council are something *extra*," even when passed under the authority of an Imperial statute itself in force in the colony.

A fortiori a colonial parliament can by statute determine the extent to which English statute law of date anterior to the colony's settlement is to be part of the law of the colony.

As the above extract indicates, the English authorities turn upon the question of reasonable applicability. In one of the earliest cases [5] Sir William Grant held that the Statute of Mortmain[6] (so 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[7] the House of Lords approved of the principle thus laid down, and subsequent English authorities are but applications of it.[8] 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." [9] The extent to which English law, common and statutory, is to be applied in New South Wales was declared by Imperial statute,[10] but the construction put upon the Act has placed that colony in line with other settled colonies.[1] 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"

[5] Atty.-Gen. v. Stewart, 2 Mer. 143.

[6] 9 Geo. II. c. 36 (Imp.).

[7] Whicker v. Hume, 7 H. L. Cas. 124; 28 L. J. Chy. 396.

[8] 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.

[9] *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.

[10] 9 Geo. IV. c. 83 (Imp.).

[1] Whicker v. Hume and Atty.-Gen. v. Love, both *ubi supra*.

of any such laws and statutes as might be deemed expedient. In the absence of such colonial legislation the courts of the colony were to decide as to the application of any such laws or statutes within the colony. It was held by the Privy Council [2] 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.

The Canadian cases upon this subject are numerous, and owing to some divergence of view, must be considered, so to speak, by provinces.[3]

The Maritime Provinces have always been treated as colonies by settlement[4] 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[5] may be considered classic upon this question and subsequent decisions there have practically been but the application of the principles enunciated in it.

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

[2] Harris v. Davis, (1885) 10 App. Cas. 279; 54 L. J. P. C. 15.

[3] The position of Quebec is so entirely unique that it will not appear in this connection. Its civil law, founded on the "*Code Civile*" of Napoleon, has since been recast into a provincial code, and no reference to English law is in order in that province in the sense now under discussion. As to the criminal law, its recent codification obviates any further reference to it.

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

[5] 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.

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 than 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 [6] operative within the province to prevent the Crown from granting a general right of fishery. Again it was held [7] 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

[6] Meisner v. Fanning, 2 Thomp. 97.

[7] Wheelock v. McKeown, 1 Thomp. 41 (2nd ed.); and see also Miller v. Lanty, *ib.*, 161.

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." [8]

The view expressed by Haliburton, C.J.,[9] 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 Imperial 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." [10]

And, in like manner, the Imperial statutes giving aliens a right to a jury *de mediatate linguae* were held [1] 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 a late case [2] the Supreme Court of Nova Scotia had to consider the question whether or not the Imperial statute (12 Geo. II. c. 18) requiring notice to a convicting justice

[8] Followed in Scott v. Henderson, 2 Thomp. 115; and cf. Smyth v. McDonald, 1 Old. 274.

[9] In Uniacke v. Dickson; see the passage, *ante*, p. 42.

[10] Jackson v. Campbell, 1 Thomp. 18 (2nd ed.).

[1] Reg. v. Burdell, 1 Old. 126.

[2] 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*, p. 46, n. 4.

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."

A number of Imperial Acts have been acted upon without question as introduced into Nova Scotia upon its settlement. The Statute of Uses was treated [3] as being in force within the province, while its companion—the Statute of Enrolment—would appear to have been thought [4] inapplicable by reason of the lack of facilities for enrolment. The Imperial Acts of Hen. VIII. allowing partition between joint tenants and tenants in common were held[5] 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[6] 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

[3] Shey v. Chisholm, James, 52.

[4] Berry v. Berry, 4 R. & G. 66; see the contrary holding in New Brunswick, *Doe d.* Hanington v. McFadden, Berton, 153.

[5] Doane v. McKenny, James, 328.

[6] The Dart, *Stewart*.

been acted upon without question,[7] as also the Act of Henry VIII. against the buying of pretended titles.[8]

Upon a review of the Nova Scotia decisions, it appears that the admission of Imperial 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, Acts 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 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 Imperial statutes not originally capable of being made operative, but which might be thought suitable to the changed circumstances of the colony. And in the same spirit it was laid down[9] 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."

In New Brunswick an early case,[10] 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,[1] 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 emi-

[7] Tarratt v. Sawyer, 1 Thomp. 46 (2nd ed.); Moore v. Moore, 1 R. & G. 525; and Graham v. Bell, 5 R. & G. 90.

[8] Wheelock v. Morrison, 1 N. S. D. 337; Scott v. Henderson, 2 Thomp. 115.

[9] Freeman v. Morton, 2 Thomp. 352, *per* Bliss, J.

[10] *Doe dem.* Hanington v. McFadden, Berton, 153.

[1] Atty.-Gen. v. Stewart, 2 Mer. 143; see *ante*, p. 40.

grating colonists as part of the law of England relating to real property. As to the Statute of Enrolment more 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.[2]

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 Imperial 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 Imperial 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.[3] At the same time it must be confessed that this distinction cannot be clearly pointed out in every case.[4]

[2] 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.

[3] Compare the "English Law" Acts of Manitoba and the N. W. T. with the British Columbia Act. See *post*, pp. 53, 54, 56.

[4] For other New Brunswick cases, see *Ex parte* Ritchie, 2 Kerr. 75, and *Ex parte* Bustin, 2 Allen, 211, in which the English 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.

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.[5] In like manner, in 1791, they established the new immigration in content in the upper province by giving them an assembly of their 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,[6] "that was done which no doubt was anticipated and intended as a consequence of erecting Upper Canada into a separate province."[7] 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. Owing to the difference in the phraseology of the two Acts of 32 and 40 Geo. III. a marked difference in effect has been attributed to these two enactments.

[5] See Confed. Deb., p. 606, and the author's "History of Canada," p. 108.

[6] 32 Geo. III. c. 1 (U.C.).

[7] *Per* Robinson, C.J., in *Doe d.* Anderson v. Todd, 2 U. C. Q. B. 82.

In the province of Ontario, therefore, the whole question turns upon the effect which should be given to these, our own 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[8] by the courts of Upper Canada, the same method of enquiry has been followed in that province (now Ontario) as in the Maritime Provinces.

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,[9] 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,[10] the Statute of Frauds,[1] the Acts of Elizabeth's time as to fraudulent and voluntary conveyances,[2] 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 some 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[3] 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 years ago, but is not now, and never

[8] 32 Geo. III. c. 1 (U.C.).
[9] Taylor, 546.
[10] 27 Hen. VIII. c. 10.
[1] 29 Car. II. c. 3.
[2] 12 Eliz. c. 5; 27 Eliz. c. 4.
[3] 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.

was, adapted to the population of a colony, and was never in force here."[4]

In the third case[5] 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 bankruptcy laws.[6] 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 has been 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;[7] 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 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) have 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

[4] *Per* Sherwood, J., in Dillingham v. Wilson.

[5] 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.

[6] Expressly excepted by s. 6.

[7] The latest is Whitby v. Lipscombe, 23 Grant 1, in which all the earlier cases are reviewed. See also Smith v. Meth. Church, 10 O. R. 199; Butland v. Gillespie, *ib.*, 486.

the common law, by reason of such colonies having been first inhabited and planted by British subjects."[8] This construction places Ontario upon the same line in this matter as the Maritime Provinces and the more lately acquired provinces of Canada.

In reference to Lord Hardwicke's Marriage Act[9] the same principles were invoked[10] 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 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 weight of authority would appear to be for a negative answer — in conformity with English decisions.[1] 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 favor of an affirmative answer, except as to the 11th and 12th clauses.[2]

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.[3] To these considerations may be added:

[8] *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.

[9] 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. 34.

[10] 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 Reg. v. Secker, 14 U. C. Q. B. 604, and Reg. v. Bell, 15 U. C. Q. B. 287.

[1] *Ante*, p. 40.

[2] Lawless v. Chamberlain, *ubi supra.* These clauses render absolutely void a minor's marriage (by license) without consent of parent or guardian.

[3] 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.

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:[4] "Where solemn determinations which establish a rule of property have been acquiesced in for so long 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 expressed in those polished periods by which his written opinions were always characterized.

An earlier case[5] brings into prominence another question proper for consideration in deciding whether or not a particular Imperial 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? 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

[4] Whitby v. Lipscombe, *ubi supra*.

[5] Hesketh v. Ward, 17 U. C. C. P. 667. See *ante*, p. 46.

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." [6]

In a series of cases it was held that the provisions of 14 Geo. III. 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.[7]

As to the criminal law: Under the Upper Canadian statute of 1800,[8] 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 an Imperial 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[9] further reference to this branch of the subject need not be made.[10]

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

[6] On this principle, many English statutes referring to, *e.g.*, the courts "at Westminster" 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. 46.

[7] 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.

[8] 40 Geo. III., c. 1 (U.C.). See *ante*, p. 47.

[9] 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.

[10] In Appendix E. is a tabulated statement of English statutes as to which question has been raised in the courts. Many of these are criminal statutes.

be—on the subject matter involved. If there is none such, then:

As to the criminal law, no question can arise save the one question—Is the Act one of general English application? If so, it is, in the absence always of colonial legislation, as above specified, part of our law.

As to property and civil rights, the following points must be considered: (1) Is the Act one of general English application? (2) If so, is it an Act properly applicable to the circumstances—the commercial, religious, and social environments of this province? (3) If not so applicable, or if the matter is one of reasonable doubt, has there been a legislative recognition of the Imperial Act as being in force here? (4) 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?

Owing to the recognition by Upper Canadian judges of the propriety of making an inquiry as to the applicability of any Imperial Act to the circumstances of the province, the principles upon which the decision must rest are the same in Ontario as those laid down in the decisions of the Nova Scotia and New Brunswick courts. The statutes by which this question is governed in the provinces more lately acquired expressly make "applicability" the test of introduction.

North-West Territories: After the admission of Rupert's Land and the north-western territory to the Canadian Union,[1] the parliament of Canada continued all the then existing laws in those regions;[2] 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,"[3] subject, of course, to such alterations therein as had been effected by proper legislative authority. Down to 1887 the law in

[1] By Order in Council (Imp.) 23 June, 1870, passed under the authority of the B. N. A. Act, s. 146.

[2] 32 & 33 Vic. c. 3 (Can.). See chap. ix., *post*.

[3] R. S. O. (1886), c. 50, s. 11; 49 Vic. c. 25 (Dom.).

force was the law of England as it stood in 1670, the date of the Hudson's Bay Company's charter.[4]

The only reported case in the Territories upon this subject involved the question as to Lord Hardwicke's Marriage Act.[5] It was held not to be in force *quoad* Indians.

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."[6] The legislature of the province had dealt with this question in 1874[7] 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. ."

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

[4] *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.

[5] Reg. v. Nan-e-quis-a Ke, 1 Terr. L. R. 211. See *ante*, p. 50, as to the Ontario decisions.

[6] Sinclair v. Mulligan, 5 Man. L. R. 17: 3 Man. L. R. 481.

[7] By 38 Vic. c. 12 (Man.). In 1871, a provincial Act (34 Vic. 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. 40-1.

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.[9]

"To remove doubts" a Dominion Act was passed in 1888[10] 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[1] 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 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.[2]

British Columbia: In 1871, before its admission to the Canadian Union,[3] the legislature of the colony had enacted:[4]

"The civil and criminal laws of England, as the same existed on the 19th day of November, 1858, and so far as the

[9] See Canadian Bank of Commerce v. Adamson, 1 Man. L. R. 3, as to bills of exchange.

[10] 51 Vic. c. 33 (Dom.).

[1] Sinclair v. Mulligan, *ubi supra*: followed in Templeton v. Stewart, 9 Man. L. R. 487.

[2] *Re* Tait, 9 Man. L. R. 617.

[3] Avoiding the Manitoba difficulty as indicated by Taylor, C.J., in Sinclair v. Mulligan, *supra*.

[4] No. 70 of 34 Vic. (1871).

same are not from local circumstances inapplicable,[5] are and shall be in force in all parts of the colony of British Columbia."

This statute was held[6] 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.[7]

[5] The use of the double negative would seem to place British Columbia in line with New Brunswick: see *ante*, p. 46.

[6] M. falsely called S. v. S., 1 B. C. (pt. 1) 25: see also Scott v. Scott, 4 B. C. 316.

[7] 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. 40.

CHAPTER IV.

COLONIAL LEGISLATIVE POWER.

A colonial Act may be absolutely void and inoperative by reason and to the extent of its repugnancy to Imperial legislation extending to the colony.[1] There is, too, the power of disallowance which may be exercised by the home authorities.[2] Are there any further bounds[3] set to colonial legislative power?

It may be argued that this question is settled by the Colonial Laws Validity Act, 1865,[4] and that as any colonial law is to be held inoperative to the extent of its repugnancy, *but not otherwise,* all colonial laws not open to that charge must be held operative; that colonial legislative power is, therefore, as full as that of the Imperial parliament; and that colonial laws are equally obligatory on courts of justice. But 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. 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 jurisdic-

[1] See Chap. III., *ante* p. 27, *et seq.*

[2] See the B. N. A. Act, s. 56.

[3] The division of the field between the Dominion and the provinces may be disregarded for the purposes of this enquiry.

[4] 28 and 29 Vic. c. 63 (Imp.). Printed in Appendix B; see also *ante*, p. 27.

tion, the operation and force of sovereign legislation, though subject to be controlled by the Imperial parliament."[5]

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.[6] Lord Selborne, delivering the opinion of the committee, referred to the judgment of the court below as in effect treating the Indian legislature 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, 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 vari-

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

[6] 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. 28; 4 Cart. 1. Hodge v. Reg., *infra*, the leading case as to the position of provincial legislatures in Canada, was emphatically re-affirmed by the Privy Council in the Liquidator's Case, a full extract from which is given in the notes to s. 58, *post*, p. 139.

ance with it) it is not for any court of justice to inquire further, or to enlarge constructively those conditions and restrictions."[7]

"Jurisdiction conceded, the will of the legislature is omnipotent according to British theory and knows no superior."[8] Courts of law have no right whatever to inquire whether the jurisdiction has been exercised wisely or unwisely,[9] justly or unjustly.[10] *Magna Charta* may be interfered with,[1] taxation imposed without regard to uniformity or equality,[2] one man's property may be given to another without compensation,[3] *ex post facto* legislation passed[4]—in short, the power may be abused but "the only remedy is an appeal to those by whom the legislature is elected."[5]

In this matter no distinction can be drawn between the Dominion parliament and provincial legislatures.[6] The principle of plenary powers has been alike invoked to uphold, for example, the local option features of the Canada Temperance Act[7] and the delegation of power to license commissioners under provincial Liquor License Acts.[8]

[7] Compare the language of Marshall, C.J., in McCulloch v. Maryland, 4 Wheat. 421 (U. S. Sup. Ct.).

[8] *Per* Mowat, A.-G., *arguendo*, Reg. v. Severn, 2 S. C. R. at p. 81. The theory is not exclusively British, for, jurisdiction conceded, the same rule applies to Acts of Congress and of the State Legislatures in the adjoining Republic.

[9] Union Colliery Co. v. Bryden (1899) A. C. 580; 68 L. J. P. C. 118; *In re* C. P. R. v. York, 25 O. A. R. 65, at p. 79, *per* Meredith, J.

[10] *Re* McDowell & Palmerston (1892) 22 O. R. 563; Atty.-Gen. v. Victoria, 2 B. C. 1.

[1] *Per* Day, J., in *Ex p.* Gould, quoted with approval by Boyd, C., in *Re* McDowell & Palmerston, *ubi supra*.

[2] Fortier v. Lambe, 25 S. C. R. 422; Atty.-Gen. v. Victoria, 2 B. C. 1; Bell v. Westmount, 9 Que. Q. B. 34; 15 Que. S. C. 580; Quebec v. G. T. R., 8 Que. Q. B. 246 (affirmed by Sup. Ct. Can.); McManamy v. Sherbrooke, M. L. R. 6 Q. B. 409.

[3] *Re* Goodhue, 19 Grant, 366 (C. A. Ont., 1872).

[4] Phillips v. Eyre, *ubi supra*; Atty.-Gen. v. Foster, 31 N. B. 153.

[5] Fisheries Case (1898) A. C. 700; 67 L. J. P. C. 90.

[6] Union Colliery Co. v. Bryden (1899) A. C. 580; 68 L. J. P. C. 118.

[7] Russell v. Reg., (1882) 7 App. Cas. 829; 51 L. J. P. C. 77; 2 Cart. 12.

[8] Hodge v. Reg., (1883), 9 App. Cas. 117; 53 L. J. P. C. 1; 3 Cart. 144.

Applying, then, the rule laid down by Lord Selborne,[9] and looking to those terms of the B. N. A. Act by which, affirmatively, the legislative powers are created, and those by which, negatively, they are restricted, it appears that affirmatively the legislative power is of very wide range, namely, to "make laws in relation to" the various matters enumerated in the Act, and that of express negative restriction there is no sign within the four corners of the Act.

But, as Canada is a Dominion "under the Crown of the United Kingdom,"[10] there must be in any Canadian legislation a saving of the sovereignty of England. In the Quebec Resolutions, upon which the B. N. A. Act is founded, this restriction is express;[1] 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 restriction upon all colonial legislation.[2] In a very early case[3] 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.[4]

3. It cannot change the law of having judgments there given, reversed for error in England;[5] and others might be named.

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.

[9] *Ante*, p. 58.
[10] See the preamble to the B. N. A. Act, *post*.
[1] No. 29. See Appendix A.
[2] *Dicey*, "Law of the Const.," 105 (3rd ed.).
[3] Craw v. Ramsay, Vaugh. 292.
[4] See Chap. III., *ante*.
[5] *I.e.*, it cannot legislate in reference to the prerogative right of the Crown to hear appeals from colonial courts.

There is no doubt that any colonial legislation inconsistent with the colonial relationship to the Empire would be unconstitutional and void.[6] Many matters, too, will suggest themselves in respect to which even Canada possesses no legislative power because its exercise would be a usurpation of sovereignty in its international sense.[7]

Chief Justice Vaughan, it will be noticed, was of opinion that a colonial legislature cannot derogate from the prerogative right of the Crown to entertain appeals from colonial courts. This is part of the constitutional law of the Empire and, it is submitted, the third proposition of Vaughan, C.J., is a correct statement of the law as it stands to-day.

"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[8] 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."[9]

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.[10] 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 with the Crown's prerogative in this respect.

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

[7] See B. N. A. Act, ss. 9 and 132.

[8] The reference is clearly to an Imperial charter or Imperial Act conferring a constitution upon a colony.

[9] Atty.-Gen. (N.S.W.) v. Bertrand, L. R. 1 P. C. 520; 36 L. J. P. C. 51.

[10] Cushing v. Dupuy, 5 App. Cas. 409; 49 L. J. P. C. 63; 1 Cart. 252, in which the earlier cases are reviewed.

"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 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 this appeal is not affected by this enactment."[1]

In a later case[2] it was intimated that a provision in a Canadian statute allowing an appeal "to the Privy Council in England in case their Lordships are pleased to entertain the appeal" 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 the advisers of the Queen, by any legislation either of the Dominion or of the provinces of Canada."[3]

There is a further implied restriction upon colonial legislative power, namely, the territorial limitation. The question as to the territorial area within which an Imperial statute is to have operation, the persons, property, and acts to be affected thereby, is one to be determined upon the construction of the statute itself[4] read in the light of certain well established presumptions against undue extension. "Ordinarily," said Lord Cranworth,[5] "our statutes speak only to the inhabitants of Great Britain and Ireland."

"It may be said generally that the area within which the statute[6] is to operate and the persons against whom it is to

[1] Cushing v. Dupuy, *ubi supra*.

[2] Indian Claims Case, (1897) A. C. 199; 66 L. J. P. C. 11.

[3] This passage does not touch the exact point now under discussion, but it is a strong intimation that the appellate jurisdiction of the Crown in Council is matter of Imperial concern beyond the competence of a colonial legislature to deal with. It resembles the power lodged in the Crown in Council to disallow colonial Acts.

[4] Reg. v. Jameson, (1896) 2 Q. B. 425; 65 L. J. M. C. 218; Colquhoun v. Brooks, (1888) L. R. 21 Q. B. D. 65; 57 L. J. Q. B. 439; Cope v. Doherty, (1858) 2 DeG. & J. 614; 27 L. J. Chy. 600.

[5] Brook v. Brook, 9 H. L. Cas. 193, 222; and see Chap. III., *ante*, as to extension of Imperial Acts to the colonies.

[6] The Foreign Enlistment Act, 1870 (Imp.).

operate are matters of construction upon the statute itself. The object of construction is to arrive at what the legislature meant by the language they have used in the enactment. But there may be suggested some general rules—for instance, if there is nothing which points to a contrary intention, a statute will *primâ facie* be taken to apply only to the United Kingdom. Where, as here, it is applicable to the Queen's dominions, it will be taken to apply to all persons in the Queen's dominions, including those who owe temporary allegiance—foreigners living in the country during their residence there; and, according to the context, a statute may be taken to apply to the Queen's subjects everywhere. Another general canon of construction is this—that if any construction otherwise be possible[7] 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."[8]

The Imperial parliament is the authorized exponent of the will of the nation in its international sense. So far as other nations are concerned, its enactments are of course inoperative beyond the borders of the Empire, including within those borders, the "floating islands" of the British navy and mercantile marine.[9] But if no construction otherwise be possible effect must be given by all courts throughout the Empire to

[7] A notable example of construction to save jurisdiction is afforded by McLeod v. Atty.-Gen. (N.S.W.), (1891) A. C. 455; 60 L. J. P. C. 55.

[8] *Per* Lord Russell of Killowen in the Transvaal Raid Case, Reg. v. Jameson, *ubi supra;* and see Jeffrey v. Boosey, 4 H. L. Cas. 815; 24 L. J. Ex. 81; Santos v. Illidge, 8 C. B. N. S. 869; 29 L. J. C. P. 348.

[9] Reg. v. Anderson, L. R. 1 C. C. R. 161; Reg. v. Carr, L. R. 10 Q. B. D. 76. As to the "three miles from shore" limit, see Direct U. S. Cable Co. v. Anglo Amer. Tel. Co., L. R. 2 App. Cas. 394; 46 L. J. P. C. 71; Rolet v. Reg., L. R. 1 P. C. 198; The Grace, 4 Ex. Ct. R. 283.

Imperial legislation in respect of persons,[10] property,[1] or acts[2] not in an international sense within the legislative ken of the British parliament.

"It cannot be supposed that the legislature merely by using general words which are well applicable to all the circumstances properly within the jurisdiction of this country are attempting to do that which is an outrage upon the law of nations, and which would lead to inevitable and unanswerable remonstrance. It is true that if we come to the conclusion that the legislature intended to commit what I deliberately call an outrage, we are bound as administrators of the law to administer it, leaving to the government of the country the responsibility of attempting to answer the just remonstrances which would be made."[3]

If, therefore, the Imperial parliament should enact that any person, British subject or foreigner, committing a particular act abroad, should, if found within British territory,[4] suffer upon conviction a certain punishment;[5] or that, in deciding a civil action in respect to contracts made abroad to be performed abroad, English law should govern;[6] there is no doubt every British court of justice would be obliged to give effect to the enactment. May the same rule be laid down in regard to colonial Acts? Or, if not as to colonial legislation generally, may it be laid down in regard to Canadian legislation since 1867? Owing to a marked divergence of view

[10] Niboyet v. Niboyet, L. R. 4 P. D. 20; 48 L. J. Prob. 1.

[1] Colquhoun v. Brooks, L. R. 19 Q. B. D. 406; 21 Q. B. D. 65; 57 L. J. Q. B. 70, 439.

[2] Rex v. Russell, (1901) A. C. 446; 70 L. J. K. B. 998; Sussex Peerage Case, 11 Cl. & F. 146. See also Santos v. Illidge, *ubi supra*.

[3] *Per* Lord Esher in Colquhoun v. Brooks, *ubi supra*. Compare with this his language in Niboyet v. Niboyet, *ubi supra;* and see also Reg. v. Keyn, L. R. 2 Ex. D. 63, 152, 160; 46 L. J. M. C. 17, 60, 64; Cooke v. Chas. A. Vogeler Co., (1901) A. C. 102; 70 L. J. K. B. 181 (H.L.); 69 L. J. Q. B. 375.

[4] See *per* Bramwell, B., in Santos v. Illidge, 8 C. B. N. S. 869; 29 L. J. C. P. 348.

[5] See s. 267 of the Merchants' Shipping Act, 1854; Reg. v. Anderson, L. R. 1 C. C. R. 161. And see Reg. v. Ellis, 68 L. J. Q. B. 103.

[6] See Santos v. Illidge, *ubi supra*.

exhibited in the Canadian cases these questions call for careful consideration:

1. *As a question of legislative competence, is there any territorial limitation at all in the case of a colony to which the Colonial Laws Validity Act*[7] *applies?*

Two cases decided by the Privy Council since 1865 seem to authoritatively affirm that the same territorial limitation exists as before the passage of the Colonial Laws Validity Act. In the earlier case[8] the opinion was expressed (*obiter*, it is true, but without qualification) that the legislature of Victoria could not confer on the courts of that colony jurisdiction to try offences committed on the high seas. In the later case[9] it was held that the legislature of New South Wales could not affix criminal character to an act committed beyond the limits of the colony by one who, apparently, was not resident or domiciled in it. In neither of these cases does any suggestion appear that the Colonial Laws Validity Act had any bearing on the questions decided.[10]

2. *Is there any territorial limitation in regard to Canadian legislation under the B. N. A. Act?*

By some Canadian judges the view has been strongly expressed that in this matter of "*extra*-territorial"[1] legislation

[7] 28 & 29 Vic. c. 63 (Imp.). See *ante*, p. 57.

[8] Reg. v. Mount, (1875) L. R. 6 P. C. 283.

[9] McLeod v. Atty.-Gen. (N.S.W.), (1891) A. C. 455; 60 L. J. P. C. 55.

[10] 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:" see Jour. Leg. Ass. Can., 1862, p. 101. Most of the authorities are discussed in *Re* Bigamy sections of Criminal Code, 27 S. C. R. 461. Ashbury v. Ellis, (1893) A. C. 339; 62 L. J. P. C. 107; 5 Cart. 636; Stairs v. Allen, 28 N. B. 410; Deacon v. Chadwick, 1 O. L. R. 346; and the cases as to colonial legislation relating to naturalization and aliens (see B. N. A. Act, s. 91, No. 25), should be read in this connection.

[1] In Reg. v. Brierly, 14 O. R. 525; 4 Cart. 665, Boyd, C., seems to be of opinion that "extra-territorial" legislation means legislation

Canadian legislatures are in precisely the same position as the Imperial parliament.[2] If so, Canadian courts must enforce such legislation, leaving it, not to the Dominion or provincial government concerned, but to the Imperial authorities to answer any remonstrance from a foreign power. The question has been recently considered by the Supreme Court of Canada[3] and the judgment of the majority affirms the validity of certain sections of the Criminal Code which make it "bigamy" for a British subject resident in Canada to commit the offence abroad, provided he leaves Canada with intent to commit it. The views of some of the judges, however, would support a much more comprehensive enactment; more comprehensive, even, than the existing British statute on the subject.[4]

Privy Council decisions lend no sanction to the view that under the B. N. A. Act Canadian legislatures stand upon a footing different from that of the other self-governing

which it is attempted to enforce abroad. Does not this unduly limit its meaning? In the books it is constantly used to describe the attempt by the legislature of one state to determine the legal relation to arise in that state from acts done and contracts entered into in another.

[2] See particularly the judgments of Gwynne, J., and Girouard, J., in *Re* Bigamy sections of Criminal Code, 27 S. C. R. 461, and of Boyd, C., in Reg. v. Brierly, *ubi supra*. It is submitted that the limitation of the lines of judicial investigation open to a Canadian judge to a consideration of the express provisions of the B. N. A. Act on the one hand, and of the Colonial Laws Validity Act on the other, is to leave untouched those implied restrictions to which reference has been made in an earlier part of this chapter—such, e.g., as those indicated in Craw v. Ramsay, *ante*, p. 60.

[3] *Re* Bigamy sections of the Criminal Code, 27 S. C. R. 461. There were two conflicting decisions on the subject in Ontario (Reg. v. Brierly, 14 O. R. 525, Chy. Div., in which the sections were held *intra vires*, and Reg. v. Plowman, 25 O. R. 656, Q. B. D., in which they were held *ultra vires*), and the Dominion government referred the question to the Supreme Court. No one appeared to argue against the constitutionality of the sections. The result has been to give the question a wider range than ever. The dissenting judgment of Strong, C.J., is, it is submitted, in accord with the views held in England, judicially and officially. See *post*.

[4] See Rex v. Russell, (1901) A. C. 446; 70 L. J. K. B. 998.

colonies. Provincial legislatures have been more than once described as acting within limits of subjects *and area*.[5]

And the law officers of the Crown in England have not, so far as appears, considered that the B. N. A. Act has worked any change. 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[6] 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 affidavits made in one province of the Dominion for use in another province.[7]

In courts of justice in England and other British colonies, Canadian law (statutory and common) is entitled to at least as full recognition as is accorded to the laws of any foreign nation on principles of international comity.[8] On

[5] Hodge v. Reg., (1883) 9 App. Cas. 117; 53 L. J. P. C. 1; 3 Cart. 144; quoted with approval and applied to all the provinces in Liquidators of Mar. Bank v. Rec.-Gen. of N. B., (1892) A. C. 437; 61 L. J. P. C. 75; 5 Cart. 1. If it be said that this has reference to the provincial area as distinguished from the Dominion, how does it touch the argument? Moreover the passage in Hodge's Case is also quoted and applied in Powell v. Apollo Candle Co., 10 App. Cas. 282; 54 L. J. P. C. 7; 3 Cart. 432; and the legislature of New South Wales (where there was no division of the field as in Canada), described as "restricted in the area of its powers." The word "area" has the same meaning in all these passages, namely, geographical area. See also the passage quoted from Phillips v. Eyre, *ante*, p. 57-8.

[6] Can. Sess. Pap., 1870, No. 39; see *Todd*, "Parl. Gov't in Brit. Col." 150.

[7] 33 Vic. c. 26 (Dom.), amending 32 & 33 Vic. c. 23, s. 3. As already intimated there is a wide discussion of this whole question as to "extra-territorial" legislation in *Re* Bigamy sections, *supra*, and most of the authorities are there reviewed; for which reason they are omitted from this edition. The opinion of the law officers of the Crown on a somewhat cognate question, viz., the power of Canadian parliaments to repeal or amend Imperial Acts of date anterior to 1867, is referred to *ante*, p. 37-8.

[8] Phillips v. Eyre, L. R. 4 Q. B. at p. 241; 38 L. J. Q. B. 123; Reg. v. Brierly, 14 O. R. at p. 534; 4 Cart. 665.

appeals to the Privy Council, judicial recognition is, of course, accorded them;[9] in other cases, they must be proved as *fact*. The 6th section of the Colonial Laws Validity Act, 1865,[10] provides for a simple method of proof of colonial statutes, viz., a copy of the Act certified as such by the proper officer of the legislature whose enactment it is.

The Privy Council has moreover laid down this broad proposition:[1] that the law contained in an Act of the legislature of a colony ratified by the express sanction of Her Majesty is, in every case to which it is applicable, of binding authority, equally in the Queen's High Courts in England, and in Vice-Admiralty Courts in the colonies. In an action therefore in an English court or the court of another colony, the law of Canada would be given effect to, either on the doctrine of comity or on the stronger doctrine enunciated by the Privy Council in the case just mentioned.

[9] Cameron v. Kyte, 3 Knapp. P. C. at p. 345.

[10] 28 & 29 Vic. c. 63 (Imp.). See Appendix B.

[1] Redpath v. Allen, L. R. 4 P. C. 511. The expression "ratified by the express sanction of Her Majesty" would seem to be rhetorical, meaning "not disallowed."

CHAPTER V.

THE B. N. A. ACT, 1867.

30-31 VIC. c. 3 (IMP.).

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for purposes connected therewith. (*a*)

(*a*) *A Constitutional Act.*—In most of the cases under the B. N. A. Act the problem has been to reconcile those sections (91 *et seq.*) which divide the field for legislative purposes between the Dominion and the provinces, and a number of principles or rules of interpretation have been laid down in dealing with such cases.[1] But the cases are few in which the question is touched as to the view to be taken of the Act as being, what it clearly is, a great constitutional charter. The Privy Council has, indeed, laid down[2] 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. Nevertheless their Lordships have not been unmindful of the high political nature of some of its provisions. 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."

The same remark might well be applied, with but slight alteration, to those sections of the Act which distribute plen-

[1] See the notes to s. 91, *post*, p. 196.

[2] Bank of Toronto v. Lambe, 12 App. Cas. 575; 56 L. J. P. C. 87; 4 Cart. 7.

[3] Mercer v. Atty.-Gen'l. (Ont.), 8 App. Cas. 767; 52 L. J. P. C. 84; 3 Cart. 1.

ary powers of legislation[4] between the Dominion parliament and the provincial legislatures.

Courts sometimes look at Acts *in pari materia* with the particular statute in hand in order to determine its construction;[5] and it is noteworthy that the Acts which have been utilized by the Privy Council in determining the meaning to be given to the B. N. A. Act have been almost uniformly "constitutional" Acts. For instance, in giving a wide interpretation to the words "property and civil rights" (No. 13 of section 92) justification was found in the Quebec Act, 1774, in which the same phraseology was used in a clearly large sense;[6] and in the same case the words "regulation of trade and commerce" (No. 2 of section 91) were given a limited meaning in accordance with the view taken of somewhat similar words in the Act of union between England and Scotland.[7] The scope of the phrase "peace, order and good government" in the B. N. A. Act 1871, was determined by reference to the same phrase in a constitutional Act relating to India, which had been held "apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to."[8] And 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 legislative power, their Lordships held that imprisonment "with or without its usual accompaniment, hard labour" might be imposed by provincial statutes;[9] a con-

[4] See *ante*, p. 57 *et seq.*

[5] See *post*, p. 196.

[6] Parsons' Case, 7 App. Cas. 96; 51 L. J. P. C. 11; 1 Cart. 265. The Quebec Act is referred to *ante*, p. 47. The same phrase, evidently taken from the Quebec Act, was used in the Act introducing English law into Upper Canada: see *ante*, p. 47.

[7] The passages are quoted *post*, p. 200.

[8] Riel v. Reg., 10 App. Cas. 675; 55 L. J. P. C. 28; 4 Cart. 1, following evidently Reg. v. Burah, 3 App. Cas. 889; 3 Cart. 409: see *ante*, p. 58.

[9] Hodge's Case, 9 App. Cas. 117; 53 L. J. P. C. 1; 3 Cart. 144. See cases noted *post*, p. 313.

struction which Burton, J.A., aptly characterizes as broad, liberal, and quasi-political.[10]

Historical Aids to Interpretation.—It is, of course, proper to have regard to the circumstances surrounding the passage of the Act.[1] But the rule is of limited application. In a comparatively recent case [2] the Privy Council, referring to the grounds upon which an earlier case [3] had been determined, said:

"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 duty is to interpret not to enact. It is true that the construction put by this Board upon the first sub-section [4] 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

[10] Reg. v. St. Catharines Milling Co., 13 O. A. R. at p. 165.

[1] *Per* Strong, J., in St. Catharines Milling Co. v. Reg., (1887), 13 S. C. R. at p. 606; 4 Cart. at p. 135. Many other *dicta* of Canadian judges to the same effect are given in the notes to proposition 4 in Mr. *Lefroy's* "Leg. Power in Can.," p. 41, *et seq.* See, however, the note (1) on p. 41.

[2] Brophy's Case, (1895), A. C. 202; 64 L. J. P. C. 70; 5 Cart. 156.

[3] Barrett's Case, (1892), A. C. 445; 61 L. J. P. C. 58; 5 Cart. 32.

[4] Of s. 22 of the Manitoba Act, 33 Vic. c. 3 (Dom.), relating to the legislative power of the Manitoba assembly as to education. The Manitoba Act was validated by the B. N. A. Act, 1871; see *post*.

[*29th March, 1867.*]

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire (*b*) to be federally

---

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."

(*b*) *The Quebec Resolutions.*—As is well known, the B.N.A. 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, has never referred to them in its judgments. For instance, 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 B. N. A. Act, both of which clearly negative the view contended for by counsel for the Dominion. The fact that the B. N. A. Act must be judicially interpreted as expressing the will of the Imperial parliament rather than of the federating provinces tends to make it very doubtful how far, if at all, it is proper to refer to these resolutions. The fact, too, that they were subjected at

[5] Printed in full in the Appendix.
[6] Fisheries Case, (1898) A. C. 700; 67 L. J. P. C. 90.
[7] See No. 55 (5).

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:

London to revision by the delegates from the various provinces, renders them still more unreliable as legal guides to the interpretation of the B. N. A. Act.[8]

United States Decisions.—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 study of the B. N. A. Act.[9] 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;[10] 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;[1] and, in some of the State

[8] See *per* Ritchie, C.J., in *Re* Portage Extension of R. R. Ry., quoted in *Lefroy*, p. 4 (n).

[9] See the remarks of Hagarty, C.J., in Leprohon v. Ottawa, 2 O. A. R. at p. 533; 1 Cart. 592.

[10] See Chap. IV., *ante*.

[1] See Art. I. ss. 9 and 10.

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:

---

constitutions more lately adopted, the limitations on the legislative power of the State legislatures certainly go to very extreme lengths.[2] 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 the constitution of the United States)[3] 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 Congress is to have legislative power, there follows this clause:[4]

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other

[2] *Bryce's* "American Commonwealth," Appendix.
[3] Art. I., s. 10.
[4] Art. I., s. 8.

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." (*c*) Short title.

---

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.[5]

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 B. N. A. 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, have always deprecated any attempt to draw analogies between the Canadian and the American systems.[6]

(*c*) There are two other Acts similarly entitled: the B. N. A. Act, 1871,[7] and the B. N. A. Act, 1886.[8] By section 3 of this

[5] *Woodrow Wilson*, "Congressional Government:" see *ante*, p. 21.

[6] See the passage from their Lordships' judgment in Lambe's Case quoted *post*, p. 172.

[7] 34 & 35 Vic. c. 28: "An Act respecting the establishment of provinces in the Dominion of Canada." See *post*.

[8] 49 & 50 Vic. 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." See *post*. By "the Parliament of Canada Act, 1875" (38 & 39 Vic. c. 38), section 18 of the B. N. A. Act, 1867, was amended: see notes to that section, *post*, p. 104.

Application of provisions referring to the Queen.

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. (*d*)

---

last statute the three Acts 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 various Imperial Orders in Council admitting other parts of British North America to the Canadian union. Under section 146 of the B. N. A. Act, 1867, these Orders in Council have the force of Imperial Acts.

(*d*) The succession to the crown of England is now regulated by the Act of Settlement.[9] By the common law of England, upon the abdication of a sovereign parliament might resettle the succession, and in comparatively modern times the Bill of Rights[10] declared that by his flight from the kingdom James II. had abdicated the throne, and the crown was settled upon William and Mary. Then came the Act of Settlement, settling the succession upon the Electress Sophia of Hanover and her heirs, being Protestants. The power of parliament to alter the succession 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.*" While colonial legislatures have full power to curtail the prerogatives of the Crown in connection with the executive government of a colony,[1] this does not extend to enable a colonial legislature to pass an Act affecting the position of the occupant of the throne of England as Executive Head throughout the Empire.[2]

[9] 12 & 13 Wm. III. c. 2 (Imp.).
[10] 1 Wm. & Mary (s. 2) c. 2 (Imp.).
[1] See *ante*, p. 10.
[2] Craw v. Ramsay, Vaugh. 292. See *ante*, p. 60 *et seq.*

II.—UNION.

Declaration of Union.

3. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, to declare by proclamation (*e*) 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 (*f*) under the name of Canada; and on and after that day those three provinces shall form and be one Dominion under that name accordingly.

Construction of subsequent provisions of Act.

4. The subsequent provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect

---

(*e*) Her Majesty's Proclamation bore date 22nd May, 1867, and provided that the Union should take effect on July 1st of that year.

(*f*) The late Mr. Justice Gwynne of the Supreme Court of Canada frequently gave strong expression to the view that Canada occupies a much higher position than that of a colony, relying upon the use of the word "Dominion" to describe the federation, the recital in the preamble that the Union should have a "constitution similar in principle to that of the United Kingdom," and the history of the B. N. A. Act.[3] But this view has not received support in any judgment of the Privy Council and the law officers of the Crown in England have always treated Canadian legislation as subject to the same limitations as affect colonial legislation generally.[4]

[3] The latest and perhaps strongest expression of this view is in *Re* Bigamy sections of the Criminal Code, (1897) 27 S. C. R. 461, in which the learned judge speaks of the "manifest intention" shown "to give to Her Majesty's subjects constituting the people of Canada a political *status* infinitely superior to that of a colony—a national existence in fact as an integral portion of the British Empire." See also the judgment of Girouard, J., in the same case. Another strong expression of opinion by Gwynne, J., is in Mar. Bank v. Reg., 17 S. C. R. at pp. 681-2; 4 Cart. at p. 421.

[4] This question is discussed in Chap. IV., *ante*, p. 60 *et seq.*

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 (*g*).

Four Provinces.

5. Canada shall be divided into four provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick (*h*).

Provinces of Ontario and Quebec.

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 On-

---

(*g*) This Act must now be read in connection with the various Imperial "Orders in Council," passed under section 146, *post*, and having, under that section, the force of Imperial statutes; and with the Acts in amendment of this Act.[5]

(*h*) At the date of Confederation, there were in British North America three other colonies, namely, Newfoundland, Prince Edward Island, and British Columbia; the balance of the territory being unorganized, except in so far as the government of the Hudson's Bay Company in Rupert's Land might be deemed an organized government. Newfoundland has so far declined all invitations to unite her fortunes with the Dominion, although she was one of the provinces represented at the Quebec Conference. Prince Edward Island and British Columbia have since joined, and the remainder of British North America has been annexed to Canada and the province of Manitoba erected therein, so that there are now seven provinces in the Dominion, exclusive of the Territories.[6]

[5] See note to s. 1, *ante*, p. 75.

[6] For the boundaries of the Dominion, and of each of the different provinces of which it is now composed, see *Houston*, "Constitutional Documents of Canada," p. 271.

tario; and the part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.

Provinces of Nova Scotia and New Brunswick.

7. The Provinces of Nova Scotia and New Brunswick shall have the same limits as at the passing of this Act.

Decennial census.

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 (*i*).

III.—EXECUTIVE POWER.

Declaration of Executive Power in the Queen.

9. The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen (*j*).

(*i*) In order to a re-adjustment of the representation of the respective provinces in the parliament of Canada.[7]

(*j*) *The Crown in relation to Canada.*—The British form of government is monarchical. The common law of England recognizes only one executive magistrate as exercising authority without commission from any other within or without the realm. "The King of England is not only the chief but properly the sole magistrate of the nation, all others acting by commission from and in due subordination to him."[8] This principle stands good throughout the Empire. The Crown is one and indivisible,[9] "the highest and ultimate source of all executive authority throughout the Queen's dominions."[10]

But the British monarchy is a limited monarchy. The power and duty of the Crown is to execute the laws of the

[7] See notes to s. 51, *post*.

[8] *Chitty*, "Prerog. of the Crown," 4.

[9] *Per* Strong, J., in Reg. v. Bank of N. S., 11 S. C. R. 1; 4 Cart. 391, citing *Re* Bateman's Trust, L. R. 15 Eq. 355; 42 L. J. Chy. 553.

[10] *Per* Higinbotham, C.J., in Musgrove v. Chun Teeong Toy, 14 Vic. L. R. 349; 5 Cart. at p. 573.

realm. The King is not above the law but under it and bound by it equally with the meanest of his subjects. No commission from him would carry authority to act otherwise than according to law.[1]

In order to the due execution of the laws, the common law of England has invested the executive head of the nation with certain attributes and powers, collectively known as the prerogatives of the Crown. Power to alter the law of the land was no part of these prerogatives.[2] That power rested exclusively with parliament and the *lex et consuetudo parliamenti* was equally part of the common law of England. The legal theory of British jurisprudence is that further back than any court will look there was, as part of the common law, a fundamental law of the constitution by virtue of which both King and parliament had their legal being.[3] By this fundamental law 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

[1] *Chitty*, 5; *Bracton*, L. 1, c. 5.

[2] The power of the Crown, without parliament, to make such laws as might seem proper for a *conquered* territory, was no exception in reality; its exercise was in the nature of executive action. See *Clark*, "Colonial Law," 6, 8; Campbell v. Hall, Cowp. 204; and 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 L. C. Jur., vol. 1, 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.*

[3] "The original right of the kingdom and the very natural constitution of our state and policy," *per* Yelverton, *arg.* 2 St. Tr. 483. And see *Hale* "Hist. of the Common Law;" *Broom* "Const. Law," 2nd ed., p. 245, *et seq.*

administration of public affairs; whereupon, in the exercise of the prerogative right vested in him by the common law to summon the 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 the law to the execution of which the power and duty of the King was limited. 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*.[4]

The older authorities on this branch of law[5] 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.[6] *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 servile lawyers and tortured into legal justification for executive oppression.

But all these "prerogatives of the Crown" are nothing more than powers and privileges vested by the common law of England in the nation's chief magistrate. "The law makes the King."[7] The attributes and powers which attach

[4] For the proper interpretation of this phrase, see *Steph.* Comm., Vol. II., 340.

[5] "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.*

[6] "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.

[7] *Bracton*, L. 1, c. 8; and see *Hale*, "Hist. of the Com. Law," *Broom*, "Const. Law," 248 (2nd ed.).

to his office as executive head of the nation are part of the common law; are defined and limited by that law, and are in aid of the executive.[8] Over against, or at least distinct from the King, stands parliament. It is the creation of that same common law,[9] and to it alone is entrusted the power to alter the law of the land, whether common or statutory, upon any and every subject. Parliament, therefore, can alter the *lex prerogativa*;[10] and it needs no very extensive knowledge of English history to appreciate that the House of Commons never relinquishes what it gains of control over the executive.

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 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 discretion in connection with them has vanished. They have very largely ceased to be common law prerogatives and are now statutory powers.

At this stage, some attempt should perhaps be made to classify the "prerogatives of the Crown" as they are enumerated in the works of such writers as *Hale*, *Blackstone*, and *Chitty*. 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 :

[8] *Broom*, 316.

[9] *Steph.* Comm. (5th ed.), vol. II. p. 335.

[10] So far, indeed, does the power of parliament over the executive extend, that it can "make laws and statutes of sufficient force and validity to limit and bind the Crown and the descent, limitation, inheritance and government thereof;" at least the statute, 6 Anne c. 7, adjudges traitors all who affirm the contrary.

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.[1]

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

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

4. Prerogatives annexed to the position of the Crown as the *fountain of justice*;[4] 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, franchises, etc.[5]

6. The superintendency of commerce.[6]

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

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:[8]

[1] *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 *post,* p. 90.

[2] *Chitty,* 50.—See *ante,* p. 40.

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

[4] *Chitty,* 75.

[5] *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. But see as to franchises, Perry v. Clergue, 5 O. L. R. 357; Atty.-Gen. v. British Museum, (1903) 72 L. J. Chy. 742.

[6] *Chitty,* 162.

[7] *Ib.,* 199.

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

"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." [9]

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 [10] 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.

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 text writers on this branch of law. The two following quotations exhaust all that Chitty has to say on the subject: [1]

"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.

[9] 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.

[10] "Law and Custom of the Const.," 3 *et seq.* See *Lefroy*, 73 (n).

[1] *Chitty*, 25, 32.

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, *prima 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;[2] is possessed of a share of legislation;[3]; 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.[4] 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."

[2] But see cases noted, *ante*, p. 40.

[3] See *post*, p. 104.

[4] 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.

In a conquered or ceded colony, therefore, which continues to be governed by a foreign law,[5] the *lex prerogativa* of English jurisprudence is to be no more deemed in force there than is any other branch of English law,[6] subject, as Chitty puts it, to the operation therein of those fundamental rights and principles on which the King's authority rests and which are necessary to maintain it; in a settled colony the *lex prerogativa* of English law is carried with them by the settlers, to the same extent and with the same conditions as to applicability [7] as is the case with the other branches of the common law.

"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."[8]

"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." [9]

The power of colonial legislatures being, within the sphere of their authority, plenary,[10] 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 King-

[5] Forsyth, 12 *et seq.*; *Dicey*, "Law of the Const.," 51 (n); Exchange Bank v. Reg., *ubi supra*.

[6] In some instances this rule has invested the executive officers with a wide discretionary authority, the foreign law in force in such colony recognizing the existence of such wide discretion in executive government: see Reg. v. Picton, 30 St. Tr. 225; Forsyth, 87.

[7] See Chap. III., *ante*, p. 38 *et seq.*

[8] *Per* Strong, J., in Reg. v. Bank of N. S., 11 S. C. R. 1.

[9] Liquidators' Case, *ubi supra;* and see *Re* Bateman's Trust, L. R. 15 Eq. 355. A fuller extract from the judgment in the Liquidators' Case is given in the notes to s. 58, *post*, p. 137.

[10] See *ante*, p. 57 *et seq.*

dom.[1] 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."[2] A glance through Canadian statutes will disclose that Canadian legislatures have freely legislated in reference to the Crown's prerogatives, and that the discretionary 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.

[1] The proclamation which followed the treaty of Paris made provision for the calling together in Canada, Grenada, and east and west Florida, of "general assemblys," empowered "to make, constitute, and ordain laws . . for the public peace, welfare, and good government of our said colonies and of the people and inhabitants thereof;" and Lord Mansfield held in Campbell v. Hall, (Cowp. 204) that the effect of this was to prevent the Crown from thereafter exercising legislative authority within the colony. The act of legislative authority questioned in that case was the imposition by Imperial Order in Council of an export tax on certain commodities, and the reason given for the decision was that the Crown was irrevocably pledged "that the subordinate legislation over the island should be exercised by an Assembly, with the consent of the Governor in Council, in like manner as in the other provinces under the King," and settlers were guaranteed a government by, and according to the laws made by such subordinate assembly. To the like effect is the comparatively recent decision of the Privy Council (*Re* Lord Bishop of Natal, 3 Moo. P. C. N. S. 115), that "after a colony or settlement has received legislative institutions, the Crown (subject to the special provision of any Act of parliament, stands in the same relation to that colony or settlement as it does to the United Kingdom." The decision in this last case was that the Crown has no power to constitute, by letters patent, a bishopric or appoint a bishop with ecclesiastical jurisdiction in a colony possessed of an independent legislature. See *ante*, p. 40.

[2] 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.

But the Crown is, by the common law and for the very purpose of protecting the royal executive authority,[3] 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 limitations. No power short of revolution can ever take it away. This fundamental principle of the British monarchy is operative throughout the Empire; the Crown is a constituent branch of every legislature properly so called. "It would require," said their Lordships of the Privy Council,[4] "very strong 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."

It is equally well established that a statute is not to be construed as depriving the Crown of any prerogative right unless the intention so to do is expressed in clear terms or appears by irresistible inference.[5] In the view of the Privy Council the provisions of the B. N. A. Act "nowhere profess to curtail in any respect the rights and privileges of the Crown or to disturb the relations then subsisting between the Sovereign and the provinces."[6] This agrees with the view expressed by Strong, J., in an earlier case[7]:—

[3] *Chitty*, "Prerog. of the Crown," p. 3; see *ante*, p. 8 for an extract from Gov. Cornwallis' commission, disclosing this reason in frank terms.

[4] Liquidators' Case, (1892), A. C. 437; 61 L. J. P. C. 75; 5 Cart. 1, holding (in conformity with their Lordships' previous *obiter* in Théberge v. Landry, 2 App. Cas. 102; 46 L. J. P. C. 1; 2 Cart. 1), that the Crown is a party to provincial legislation in Canada. See notes to s. 58, *post*, p. 140.

[5] *Maxwell*, "Interpretation of Statutes," 161; Théberge v. Landry, *ubi supra*; and cases *infra*. See also the various Dominion and provincial "Interpretation Acts."

[6] Liquidators' Case, *ubi supra*.

[7] Reg. v. Bank of N. S., 11 S. C. R. 1; 4 Cart. 391. This case, the Privy Council has said, is "in strict accordance with constitutional law;" Liquidators' Case, *ubi supra*.

"I deny, however, that there is anything in the Imperial legislation of 1867 warranting the least inference or argument that any rights which the Crown possessed at the date of Confederation in any province becoming a member of the Dominion were intended to be in the slightest degree affected by the statute; it is true that the prerogative rights of the Crown were by the statute apportioned between the provinces and the Dominion, but this apportionment in no sense implies the extinguishment of them and they therefore continue to subsist in their integrity, however their locality might be altered by the division of powers contained in the new constitutional law."

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, to which the subject matter to which such prerogative relates is assigned by the B. N. A. Act.[8] Executive action would then properly follow and be based upon such legislation.

With reference to those prerogative rights of the Crown which have not been "taken possession of by statute law"[9] the weight of judicial opinion would seem to be 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 in that government to which it is assigned for legislative purposes.[10]

[8] Q. C. Case, (1898) A. C. 247; 67 L. J. P. C. 17, affirming 27 O. A. R. 792; Pardoning Power Case, 23 S. C. R. 458; 5 Cart. 517. See, however, *Ex p. Armitage*, 5 Can. Crim. Cas. 345.

[9] The expression is Mr. *Lefroy's*. See his "Leg. Power in Can.," 144 (*n*).

[10] See cases noted *infra*. While the question may, as their lordships of the Privy Council express it "never become of practical importance" (Musgrove v. Chun Teeong Toy, (1891) A. C. 272; 60 L. J.

"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."[1]

P. C. 28; 5 Cart. 556). because statutes may easily be passed taking possession of these prerogative rights, it raises a doubt as to Canadian rights of self-government under the B. N. A. Act which, it is submitted, does 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 B. N. A. 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 been taught to regard as a thing of the past. There are of course limitations upon colonial legislative power arising from the colonial *status* (see Chap. IV. *ante*), and "all the prerogatives and powers of the Sovereign are not vested by law in the Crown's representative in a colony; nor can all of them be the subject of advice to the Governor by the Crown's ministers for the colony. The prerogatives of war and peace, of negotiation and treaty, together with the power of entering into relations of diplomacy or trade and holding communication with other independent states . . have not been vested in colonial governors by law, express or implied." (*Per* Higinbotham, C.J., in Musgrove v. Chun Teeong Toy, 5 Cart. at p. 577). 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 (*supra*), 5 Cart. at p. 606, is *a fortiori* true of Canada under the B. N. A. Act:

"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."

[1] *Per* Burton, J.A., in the Pardoning Power Case, (1892), 19 O. A. R. at p. 38. His Lordship repeats this in the Q. C. Case, 23 O.

"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."[2]

Speaking of the Privy Council's decision in the case last cited, Maclennan, J.A., says:[3]

"That judgment determined conclusively that the Crown stands in the same relation to the several provinces of the

A. R. at p. 802, and adds "This opinion seems to have been fully sustained and confirmed by the subsequent decision of the Judicial Committee," in the Liquidators Case (cited in the next note). See also *per* Boyd, C., in *Re* McDowell and Palmerston, 22 O. R. at p. 565, who speaks of the Liquidators' Case as declaring a Lieut.-Governor to be the representative of the Crown "for all purposes of provincial government."

[2] Liquidators' Case, (1892) A. C. 437; 61 L. J. P. C. 75; 5 Cart. 1.

[3] Q. C. Case, 23 O. A. R. at p. 805; see also per Hagarty, C.J., at p. 798. See also Ont. Sess Pap., 1888, No. 37, a state paper prepared by Sir Oliver Mowat, A.-G., quoted in *Lefroy*, p. 111, *et seq*. The question must turn upon the proper construction to be placed upon the various Imperial Acts conferring constitutions upon the self-governing colonies: see Musgrove v. Chun Teeong Toy, (1891), A.C., 272; 60 L. J. P. C. 28; 5 Cart. 556. The powers of the Governor-General and of the various Lieutenant-Governors are, of course, defined in and limited by their respective commissions (see notes to s. 10, *post*), but these commissions expressly refer to the office as created and defined by the B. N. A. 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 (Musgrave v. Pulido, 5 App. Cas. 102; 49 L. J. P. C. 20), has been lately applied by the Privy Council to the Governor-General of Canada (Liquidators' Case, *supra*; and see *per* Strong, J., in Reg. v. Bank of N. S., 11 S. C. R. 1; 4 Cart. 391), and would seem to be of equally proper application to a Lieutenant-Governor; indicating in each case a general delegation of authority in regard to Dominion and provincial government respectively. 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.

Application of provisions referring to Governor-General.

10. The provisions of this Act referring to the Governor-General (*k*) extend and apply to the Governor-General for the time being of Canada, or other the chief executive officer

---

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 B. N. A. Act is to distribute prerogative powers as well as powers of legislation between the Dominion and the provinces."

(*k*) 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 de-

railway belt; (3) Perry v. Clergue, 5 O. L. R. 357, in which the right to establish and grant a license for a ferry was held to appertain to the provincial executive and not to the Dominion, even for a ferry between a Canadian and a foreign port. In the Liquidators' Case, too, (*ubi supra*) the prerogative right of the Crown to priority of payment over other creditors of a bank was enforced in an action by the proper provincial officer for the benefit of the province.

[4] See preamble to 11 & 12 Wm. III. c. 12 (Imp.), quoted in the note on p. 94 *post*.

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

cisions[6] the attributes with which they had in fancy 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 *qua* 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 *qua* 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 in 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 a plea of personal privilege—of immunity from being impleaded—except as part of the larger plea that the acts complained of were done *qua* governor and as "acts of State," in which case the only remedy of the party aggrieved is by petition of right against the Crown.[1]

[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. 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. Bentinck, 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.

[1] Musgrave v. Pulido, *ubi supra*. As to what are "Acts of state," see Walker v. Baird, (1892) A. C. 491; 61 L. J. P. C. 92. In

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]

The B. N. A. Act, in addition to authorizing many specific acts on the part of the Governor-General, describes him in this section as an officer "carrying on the government of

Musgrove v. Chun Teeong Toy (5 Cart. at p. 576), Higinbotham, C.J., (Victoria), expresses the view that a colonial governor can perform an "Act of state" (an international matter) only as an Imperial officer under Imperial instructions, and not as the chief executive officer of the colony acting on the advice of colonial ministers. The judgment of the Privy Council, (1891) A. C. 272; 60 L. J. P. C. 28; 5 Cart. 556, does not touch this question. See, however, s. 132 of the B. N. A. Act which gives to the parliament and government of Canada all powers necessary and proper for performing Canadian obligations under British treaties with foreign powers.

[2] Cases *supra* and Oliver v. Bentinck, 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 the 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.*"

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.[4] No instructions from Imperial authorities would warrant a contravention of an Imperial statute such as the B. N. A. Act.[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 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 B. N. A. Act 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

[4] This question has been already discussed in the notes to s. 9. *ante*, p. 89 *et seq.*

[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 B. N. A. 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.*

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.[7] 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 B. N. A. Act the Governor-General is entrusted with the following prerogatives, the manner of their exercise being to some extent defined.

A.—*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 B. N. A. Act, the only officer therein mentioned in whose appointment the Governor-General and the Privy Council must concur is the Lieutenant-Governor of a

[7] 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.*

Province.[8] Of the few officers whose appointment, under the B. N. A. 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.—B. N. A. Act, s. 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.—B. N. A. Act, s. 24.
3. Speaker of the Senate.—B. N. A. Act, s. 34.
4. Judges.—As enumerated in B. N. A. Act, s. 96.
5. Deputy Governor-General.—B. N. A. Act, s. 14, and Letters Patent, clause VI.

B.—*The Summoning of Parliament.*[9]

C.—*The exercise of the prerogative rights of the Crown as a constituent branch of the parliament of Canada.*[10]

D.—*The disallowance of provincial Acts.*[1]

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

[8] Section 58.
[9] Section 38.
[10] Section 55.
[1] Section 90.

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,[2] Imperial and Colonial.

"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;[3] the other two—of *proroguing* and *dissolving*—exist as at common law. The "conventional" limitations are many, the legal right is absolute.

By his "instructions."[4]

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;[5] in all other cases he must follow it.

[2] 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.

[3] B. N. A. Act, 1867, ss. 20 and 38.

[4] *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. 95, and particularly Musgrove's Case, 5 Cart. 556, at p. 578, *et seq.*

[5] That is to say, he acts in such case as an imperial officer upon imperial considerations. But see Reg. v. Shortis, 32 Can. L. J. 53. In this case there was an indefensible shirking of responsibility on the part of the Dominion ministry. On the general question of the prerogative of mercy, see the Pardoning Power Case, 23 S. C. R. 458; 5 Cart. 517; *Ex p. Armitage* (1902), 5 Can. Crim. Cas. 342.

or administrator, for the time being carrying on the government of Canada on behalf and in the name of the Queen (*l*) by whatever title he is designated.

Constitution of Privy Council for Canada.

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 (*m*).

(*l*) Notwithstanding the absence from section 62 (providing for the office of Lieutenant-Governor) of this phrase "on behalf of and in the name of the Queen," 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.[6]

(*m*) Following the British practice, members of the Canadian Privy Council are not removed from their position upon the resignation of the "ministry" of which they may happen to be members; but, of course, those members only who are of the cabinet are summoned to meetings of the Privy Council.[7] Nowhere in any statute book will be found any Act laying down that such a council shall hold office only so long as it commands 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 B. N. A. Act. "It is evidently impossible to reduce into the form of a positive enactment a constitutional principle of this nature."[8]

[6] Liquidators' Case, (1892) A. C. 437; 61 L. J. P. C. 75; 5 Cart. 1. And see *ante*, p. 91.

[7] *Bourinot*, "Parl., Proc. and Pract.," (2nd ed.) 54; *Todd*, "Parl. Gov. in Brit. Col.," (1st ed.) 42.

[8] Lord Russell's famous despatch of Sept., 1839, introducing "Responsible Government" into Upper Canada: Can. Sess. Jour., 1841, pp. 390-6, App. BB. See *ante*, p. 15, and Musgrove's Case, 5 Cart. at p. 570, *et seq.*

All powers under Acts to be exercised by Governor-General with advice of Privy Council or alone.

12. (*n*) 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 exerciseable 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

---

(*n*) This section should be read with section 65 (*post*) and both follow naturally upon section 129, which provides:

"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, 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."

In so far as these 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 B. N. A. Act effects no division of these powers, but merely of the field for their exercise. By this 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

same continue in existence and capable of being exercised after the union in relation to the government of Canada, be vested in and exerciseable by the Governor-General, 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) (*o*) to be abolished or altered by the Parliament of Canada (*p*).

Application of provisions referring to Governor-General in Council.

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.

---

section 65[9] 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.

(*o*) There are no Imperial Acts conferring powers, authorities, and functions on colonial governors generally. As to Canada, all the powers, etc., conferred by the Constitutional Act, 1791, and the Union Act, 1840, are included in the B. N. A. 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.

(*p*) 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 exerciseable in relation to the government of Canada.[10] Section 65 confers like powers on the

[9] See notes to that section, *post*. As to powers other than statutory, see notes to sec. 9, *ante*, p. 89, where the question of the exercise of the Crown's prerogatives in cases where those prerogatives have not been the subject of legislation is discussed.

[10] Section 129, *post*. Dobie v. Temp. Board, 7 App. Cas. 136; 51 L. J. P. C. 26; 1 Cart. 351. Local Prohibition Case, (1896), A. C. 343; 65 L. J. P. C. 26; 5 Cart. 294.

Power to Her Majesty to authorize Governor-General to appoint Deputies.

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 (*q*).

---

provincial legislative assemblies, so far as these powers are exerciseable in relation to the government of the provinces of Ontario and Quebec.

(*q*) The commission to Lord Monck (clause 8). and the Letters Patent of 1878 (clause 6)[1] expressly authorize the appointment of a deputy by the Governor-General. In Regina v. Amer,[2] which came before the court upon a case stated, a commission to hold an assize, attested in the name of "——— Deputy of the Governor-General of Canada," was referred to, and Harrison, C.J., assumed (there being no statement to the contrary in the case)

"that the Queen authorized the appointment of a Deputy Governor, and that the prerogative power in question was conferred by the Governor-General upon the Deputy Governor without any limitation or direction on the part of the

[1] See Appendix.

[2] 42 U. C. Q. B. 391. Commissions had been issued both by the Governor-General and by the Lieutenant-Governor, and the judgment of the court affirmed the authority of the Governor-General to issue such commission; but it is submitted that the power to exercise this prerogative is properly with the Lieutenant-Governor, and not with the Governor-General—so far at least as provincial courts are concerned—as it is a prerogative directly connected with "the administration of justice in the province." See s. 92, No. 14.

Command of armed forces to continue to be vested in the Queen.

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 (*r*).

Seat of Government of Canada.

16. Until the Queen otherwise directs, the seat of Government of Canada shall be Ottawa.

IV.—LEGISLATIVE POWER. (*s*)

Constitution of Parliament of Canada.

17. There shall be one parliament (*t*) for Canada, consisting of the Queen, an Upper House, styled the Senate, and the House of Commons.

Queen, and so that it has been exercised by the proper authority."

(*r*) This is one of those matters in respect of which colonial legislative power is subject to many restrictions arising from the existence of Imperial legislation of express colonial application. So far as such legislation does not extend, the subject is, as between the Dominion and the provinces, exclusively with the former.[3]

(*s*) The title of Part IV. is not quite accurate. What is dealt with in this part is the federal legislative machinery. Incidentally some of its sections confer legislative power,[4] but the main provisions of the B. N. A. Act as to the distribution of legislative power are contained in Part VI., sections 91 to 95.

(*t*) The use of the term "*Parliament*," in reference to the legislative body of the Dominion only has been much utilized in argument to belittle the position of the provincial legislative assemblies; but their co-ordinate rank with the Dominion parliament (each supreme within its sphere of legislative authority) is now finally established.[5] The appellation

[3] See s. 91, No. 7, *post*.

[4] See ss. 18, 35, 40, 41, 47, 51, 52.

[5] Hodge's Case, 9 App. Cas. 117; 53 L. J. P. C. 1; 3 Cart. 144; Lambe's Case, 12 App. Cas. 575; 56 L. J. P. C. 87; 4 Cart. 7; Liquidators' Case, (1892) A. C. 437; 61 L. J. P. C. 75; 5 Cart. 1. As to the legislative power of colonial legislatures generally, see Chap. IV., *ante*, p. 57.

Privileges, etc., of Houses.

[**18.** (*u*) The privileges, immunities, and powers, to be held, enjoyed and exercised by the Senate and by the House

---

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 of legislation throughout the Empire,[6] and it would require very express language in any Constitutional Act to warrant the inference that supreme legislative powers "in which the British Sovereign was to have no share" have been bestowed upon any colonial legislature.[7]

(*u*) The section, as it originally stood, limited the power of the parliament of Canada to defining its privileges, etc., by its own enactment, "but so that the same shall never exceed those *at the passing of this Act* held, enjoyed, etc."

In 1873, the parliament of Canada passed an Act[8] "To provide for the examination of witnesses on oath by committees of the Senate and House of Commons in certain cases." At the date of the passage of the B. N. A. Act the committees of the Imperial "Commons' House" had no power to examine witnesses upon oath,[9] and for this reason the Dominion statute was disallowed by the Imperial Privy Council. The Act had been passed in order to facilitate enquiries into what is popularly known as the "Pacific Scandal," and its disallowance created some excitement. The result of negotiations with the Imperial authorities[10] was the passage of "The Parliament of Canada Act, 1875," which substituted the section, as above printed, for the original section 18.[1]

[6] *Chitty*, "Prerog. of the Crown:" see the passage quoted *ante*, p. 85.

[7] Liquidator's Case, *ubi supra*.

[8] 36 Vic. c. 1 (Dom.).

[9] See, however, 34 & 35 Vic. c. 83 (Imp.).

[10] Can. Comm. Jour., 1873 (Oct. Sess.), p. 5; Sess. Pap. (1877) No. 89.

[1] 38 & 39 Vic. c. 38 (Imp.). It also expressly validated 31 & 32 Vic. 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.

The law which defines the privileges, immunities, and powers of the British parliament, and of the members thereof, is almost altogether 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.[2] The powers, other than legislative, of a colonial legislature (unless expressly extended by the terms of the charter, commission, or Imperial Act[3] 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."[4]

"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 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."[5]

[2] See extract from Fielding v. Thomas, quoted *post*, p. 106.

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

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

[5] 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.

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.[6] This power, however, was conferred by the Colonial Laws Validity Act, 1865,[7] in unrestricted terms. This section 18 of the B. N. A. Act has, therefore, had the effect of limiting the power of the federal parliament to define by its own legislation the privileges, etc., of itself and its members. It can never go further than the Imperial parliament along this line, in this respect differing from the provincial assemblies, which retain the full power conferred by the Colonial Laws Validity Act. The position is thus stated by the Privy Council in the latest case on the subject:[8]

"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 contempt without express authority from the Imperial legislature. By section 1 of 38 & 39 Vic. c. 38, which was substituted for s. 18 of the B. N. A. Act, 1867, it was enacted . . There is no similar enactment in the B. N. A. 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 B. N. A. Act, and it may have been thought expedient to make express provision for the privileges, immunities, and powers

[6] 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 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.

[7] 28 & 29 Vic. c. 63 (Imp.). See Appendix.

[8] Fielding v. Thomas, *ubi supra*.

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 (*v*) 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.]

---

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[9] 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 B. N. A. 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."

(*v*) "*Powers.*"—The reference is, of course, to powers other than legislative; such, for example, as the power to com-

[9] See Appendix; also the notes to s. 92, No. 1.

mit for contempt, to compel the attendance of witnesses, and to compel the production of papers, etc., etc., which may be described as inquisitorial and punitive powers, in aid of intelligent legislation. Dominion legislation upon this subject is contained in R. S. C. (1886), c. 11, ss. 3-8, 20-23:

"PRIVILEGES AND IMMUNITIES OF MEMBERS AND OFFICERS."

3. The Senate and the House of Commons respectively, and the members thereof respectively, shall hold, enjoy and exercise such and the like privileges, immunities and powers as, at the time of the passing of "*The British North America Act,* 1867," were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom, and by the members thereof, so far as the same are consistent with and not repugnant to the said Act, and also such privileges, immunities and powers as are from time to time defined by Act of the Parliament of Canada, not exceeding those at the time of the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof respectively.

4. Such privileges, immunities and powers shall be part of the general and public law of Canada, and it shall not be necessary to plead the same, but the same shall, in all courts in Canada and by and before all judges, be taken notice of judicially.

5. Upon any inquiry touching the privileges, immunities and powers of the Senate and of the House of Commons or of any member thereof respectively, any copy of the journals of the Senate or House of Commons, printed or purporting to be printed by the order of the Senate or House of Commons, shall be admitted as evidence of such journals by all courts, judges and others, without any proof being given that such copies were so printed.

6. Any person who is a defendant in any civil or criminal proceedings commenced or prosecuted in any manner for or on account of or in respect of the publication of any

report, paper, votes or proceedings, by such person or by his servant, by or under the authority of the Senate or House of Commons, may bring before the court in which such proceedings are so commenced or prosecuted or before any judge of the same, first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceedings or to his attorney or solicitor, a certificate under the hand of the speaker or clerk of the Senate or House of Commons, as the case may be, stating that the report, paper, votes or proceedings, as the case may be, in respect whereof such civil or criminal proceedings have been commenced or prosecuted, was or were published by such person or by his servant, by order or under the authority of the Senate or House of Commons, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such civil or criminal proceedings, and the same and every writ or process issued therein shall be and shall be deemed and taken to be finally put an end to, determined and superseded by virtue of this Act.

7. If any civil or criminal proceedings are commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes or proceedings, the defendant at any stage of the proceedings may lay before the court or judge, such report, paper, votes or proceedings, and such copy with an affidavit verifying such report, paper, votes or proceedings, and the correctness of such copy; and the court or judge shall immediately stay such civil or criminal proceedings, and the same and every writ and process issued therein, shall be and shall be deemed to be finally put an end to, determined and superseded by virtue of this Act.

8. In any civil or criminal proceeding commenced or prosecuted for printing any extract from or abstract of any such report, paper, votes or proceedings, such report, paper, votes or proceedings may be given in evidence, and it may be shown that such extract or abstract was published *bona*

First Session of the Parliament of Canada.

19. The Parliament of Canada shall be called together not later than six months after the Union.

Yearly Session of the Parliament of Canada.

20. There shall be a Session of the Parliament of Canada once at least in every year (*w*), 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.

---

fide and without malice, and if such is the opinion of the jury, a verdict of not guilty shall be entered for the defendant.

* * * * * * *

EXAMINATION OF WITNESSES.

20. Witnesses may be examined upon oath or upon affirmation, if affirmation is allowed by law, at the bar of the Senate, and for that purpose the Clerk of the Senate may administer such oath or affirmation to any such witness.

21. Any select committee of the Senate or House of Commons to which any private bill has been referred, by either House, respectively, may examine witnesses upon oath or affirmation, if affirmation is allowed by law, upon matters relating to such Bill, and for that purpose the chairman or any member of such committee may administer such oath or affirmation, to any such witness.

22. Whenever any witness or witnesses is or are to be examined by any other committee of the Senate or House of Commons, and the Senate or House of Commons has resolved that it is desirable that such witness or witnesses shall be examined upon oath, such witness or witnesses shall be examined upon oath or affirmation, if affirmation is allowed by law; and such oath or affirmation shall be administered by the chairman or any member of any such committee as aforesaid.

(*w*) The object of the section, it is almost unnecessary to observe, is to preserve the English rule of annual grants for the public service. In England the rule is guarded by the passing of the Mutiny Act for one year only.

The Senate.

Number of Senators.

21. The Senate shall, subject to the provisions of this Act, consist of seventy-two members, who shall be styled Senators (*x*).

(*x*) Strange as it may appear, a perusal of the debates on the Confederation Resolutions discloses that no question was raised as to the usefulness or uselessness of an Upper House. The bi-cameral system would seem to have been at that time universally favored, so far at least as the constitution of the Dominion government was concerned. To the delegates to the Quebec Conference of 1864 two examples of an Upper House presented themselves; the English House of Lords, and the United States Senate. The position of the former in the English constitutional system is very clearly defined by Bagehot:

"Since the Reform Act, the House of Lords has become a revising and suspending House. . . . Their veto is a sort of hypothetical veto. They say, we reject your bill this once, or these twice, or even these thrice, but if you keep on sending it up, at last we won't reject it."

The House of Lords, too, is possessed of certain judicial functions. But it is manifest that, both historically and in actual practice, the House of Lords is in no sense a federal element in the constitutional system of the Empire; that in no way does it stand out as the guardian of colonial rights. The U. S. Senate, on the other hand, was instituted as a part of the federal scheme for the very purpose of protecting "state rights," and to that end each state, large or small, is entitled to two senators and no more. By the Fathers of Confederation, the Senate of Canada was announced as answering both purposes; as affording a check on hasty or ill-digested legislation,[10] and also as protecting local interests and the autonomy of the provinces. The attainment of the former purpose was supposed to be made secure by the mode

[10] "The sober second-thought in legislation:" see speech of Sir John A. Macdonald, Confed. Deb. 35, *et seq.*

of appointment, the life tenure of the senators being held out as a guarantee for independence in the exercise of their legislative duties; while the *equal* representation, in the Senate, of each of the distinctly differentiated portions of the Dominion would make that body the guardian of "provincial rights," or at least of local, as distinct from general, interests.

The Senate of Canada exercises no judicial functions akin to those exercised by the House of Lords and, to a smaller extent, by the U. S. Senate; nor has it any executive functions like those exercised by the U. S. Senate in "executive session," in relation to treaties and appointments to office. Its functions are purely legislative.

In the light of subsequent developments, the criticism of Mr. Dunkin[1] upon this part of the scheme of Confederation reads like a prophecy. Wanting in the characteristics which, to some extent, uphold the exercise of authority by the House of Lords as a "dignified" part of the constitution,[2] the revising and suspending functions of the Canadian Senate are of doubtful value; and, wanting as its members are in any distinctively different character, aims, and interests from those of the members of the popular chamber, and appointed, too, as they are, not by the provincial legislatures but by the Dominion government, they are as strongly and continuously party men as are the members of the House of Commons, and they divide on party, not on provincial or sectional, lines. Such federal element as exists at all in the constitution of the Dominion government is in the distribution of portfolios in the cabinet, as Mr. Dunkin predicted it would be.

With the entry of Manitoba, British Columbia, and the North-West Territories into the Dominion, all attempt to continue the principle of *equal* representation was abandoned in favor, practically, of representation by population, so far at all events as the new territories were concerned. Upon the passage of an Act forming a new province, such Act at once passes beyond the competence of the Dominion parliament,

[1] Confed. Deb. 493, *et seq.*
[2] See Bagehot, 89, *et seq.*

22. In relation to the constitution of the Senate, Canada shall be deemed to consist of three divisions:— Representation of Provinces in Senate.

1. Ontario;

2. Quebec;

3. The Maritime Provinces, Nova Scotia, and New Brunswick; which three divisions shall (subject to the provisions

---

and the representation allowed such new province in the Senate is thereafter incapable of increase or decrease except by Imperial legislation.[3] The representation of the province of Manitoba in the Senate is now three, with a maximum limit of four. Upon the admission of Prince Edward Island, the provisions of section 147, *post*, took effect; and that province is now represented by four Senators. Upon the admission of British Columbia, the representation of that province in the Senate was fixed at three. By the B. N. A. Act, 1886,[4] the Dominion parliament is empowered to make provision for the representation in the Senate of any territories which for the time being form part of the Dominion and are not included in any province thereof; and, pursuant to the power granted by that statute, the North-West Territories have been given two Senators. There is this peculiarity about the position of the North-West Territories: The number of Senators[5] who may be appointed to represent them is a matter entirely for the Dominion parliament, so that it is in the power of the Dominion government to swamp the Senate by additional members appointed to represent the North-West Territories. The original design has, however, left this mark upon our system, namely, that Ontario, Quebec, and the Maritime Provinces are still tied down to equality of representation in the Senate irrespective of differences in population, and any alteration of our constitution in this particular must be by Imperial Act.

[3] B. N. A. Act, 1871, s. 6; see *post*.

[4] See the Act, *post*.

[5] As to the representation of the Territories in the Commons of Canada, see notes to s. 37, *post*.

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 Lower Canada (*y*).

Qualifications of Senator.

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

---

(*y*) "It has been so arranged to suit the peculiar position of this section of the province.[6] Our Lower Canada friends felt that they had French Canadian interests and British interests to be protected and they conceived that the existing system of electoral divisions would give protection to those separate interests. We in Upper Canada, on the other hand, were quite content that they should settle that among themselves, and maintain their existing divisions if they chose."—Hon. Geo. Brown, Confed. Deb. 90.

"Lower Canada is in a different position from Upper Canada and . . . . . there are two nationalities in it, occupying certain portions of the country. Well, these divisions have been made so as to secure to both nationalities their respective rights, and these, in our opinion, are good reasons for the provision that has been made."—Sir E. P. Taché, *ib.* 210.

[6] *I.e.*, of (old) Canada.

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 lands or tenements held in franc-aleu or in roture, within the Province for which he is appointed, of the value of four thousand dollars, 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 four thousand dollars 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.

Summons of Senator.

24. The Governor-General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon (*z*) 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.

(*z*) There is no legislative regulation of the method by which the Senate is called together for the despatch of business; while in relation to the House of Commons the word "summon" is used to indicate the annual calling together of the elected members of the House for the exercise of their functions.[1] As a matter of usage (in conformity with the English

[1] See sec. 38 *post*.

Summons of first body of Senators.

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.

Addition of Senators in certain cases.

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 (*a*).

---

practice) the instrument by which the Governor-General summons the House of Commons, viz., a proclamation under the Great Seal, is addressed to both senators and members of the House of Commons.

(*a*) The Quebec Resolutions made no provisions for any alteration in the number of Senators, and the absence of such provision was commented on in a despatch of the then Secretary of State for the Colonies in these terms:

"The second point which Her Majesty's government desire should be reconsidered is the constitution of the Legislative Council. They appreciate the considerations which have influenced the Conference in determining the mode in which this body, so important to the constitution of the legislature, should be composed. But it appears to them to require further consideration, whether, if the members be appointed for life, *and their number be fixed*, there will be any sufficient means of restoring harmony between the Legislative Council and the popular assembly if it shall ever unfortunately happen that a decided difference of opinion shall arise between them."

The above section was inserted in the Act to meet the views of the Imperial authorities as expressed in this despatch, but it has never been acted upon. In the only case in which an addition to the membership of the Senate was sought under this section, it was refused by the Imperial authorities.[7]

[7] Todd, "Parl. Gov. in Brit. Col.," 164.

Reduction of Senate to normal number.

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.

Maximum number of Senators.

28. The number of Senators shall not at any time exceed seventy-eight (*b*).

Tenure of place in Senate.

29. A Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.

Resignation of place in Senate.

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.

Disqualification of Senators.

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

---

In view of the power of the Dominion parliament to regulate the number of Senators from those parts of Canada not erected into provinces, this and the next section may be said to be practically effete.

(*b*) This is the legal limit at present so far as regards Ontario, Quebec, and the Maritime Provinces; namely, seventy-two under section 21, with a possible addition of six under section 26. But in view of the provisions which have been made as to the membership of the Senate on the admission of the different provinces and territories which, since Confederation, have become part of the Dominion, there is now no "maximum number" as indicated in the marginal note.[8]

[8] See *ante*, p. 112 *et seq.*

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.

Summons on vacancy in Senate.

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.

Questions as to qualifications and vacancies in Senate.

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 (*c*).

(*c*) Up to the date of Confederation the legislatures of the various provinces had retained in their own hands the jurisdiction to determine all questions relating to the *status* of their members, and for some years after Confederation the parliament of the Dominion exercised like jurisdiction. Section 41, however, of the B. N. A. Act empowers the Dominion parliament to provide otherwise as to the House of Commons,[9] and this power has been acted upon. No similar power is given by the B. N. A. Act to alter the provisions of this section 33, as to determining the *status* of members of the Senate. As they are not elected by popular vote, question

[9] Valin v. Langlois, 5 App. Cas. 115; 49 L. J. P. C. 37; 1 Cart. 158. See notes to s. 41, *post*.

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. Appointment of Speaker of Senate.

35. Until the Parliament of Canada otherwise provides (*d*), 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. Quorum of Senate.

36. Questions arising in the Senate shall be decided by a majority of voices, and the Speaker shall in all cases have a Voting in Senate.

---

can hardly arise as to the mode of appointment, unless indeed appointments were made in excess of those allowed by the Act. As the various matters which work disqualification are, with the exception of the failure to give attendance in the Senate (see section 31, sub-section 1), matters as to which questions of disputed fact might arise, it may be worth consideration whether the determination of these matters should not be left to the courts. Up to the present time, however, none of the sub-sections of section 31 have been invoked, with the exception of sub-section 1, and upon that head the proof of disqualification would appear in the Senate's journals.

(*d*) The Privy Council has held that under these words "*until the parliament of Canada otherwise provides*," in s. 41, the Dominion parliament has full power to pass laws in relation to the various matters enumerated in that section.[10] It follows, therefore, that (apart altogether from the provisions of the Colonial Laws Validity Act, 1865)[1] the "quorum" of the Senate may be altered by the Dominion parliament. The "quorum" of the House of Commons, on the other hand, cannot—so far as the B. N. A. Act affects the question—be altered by anything short of Imperial legislation.[2]

[10] Valin v. Langlois, *ubi supra*.

[1] See Appendix.

[2] The constituent powers of the parliament of Canada are more fully discussed in the notes to s. 92, No. 1, *post*.

vote, and when the voices are equal the decision shall be deemed to be in the negative.

The House of Commons.

Constitution of House of Commons in Canada.

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 (*e*).

(*e*) Section 51 (*post*) provides for a re-distribution of the representation as between the various provinces after each decennial census. Section 52 provides that the number of members of the House of Commons may be from time to time increased, provided the proportionate representation is not thereby affected. Upon the admission of Prince Edward Island and British Columbia, and upon the formation of the Province of Manitoba, the representation in the House of Commons from those provinces was determined,[3] but subject in each case to re-distribution under section 51. The North-West Territories would seem to be in a peculiar position with regard to their representation in the House of Commons as well as in the Senate.[4] The B. N. A. Act, 1886,[5] apparently does not limit the power of the Dominion parliament to provide for the representation of the Territories in the Commons by any reference to section 51 unless, indeed, the provision (section 3) that the B. N. A. Acts of 1867, 1871, and 1886, are to be construed together, would have the effect of making the provisions of section 51 applicable to the territories. This can hardly be, however, as section 51 is distinctly limited to the re-distribution of representation as between the "provinces."[6]

[3] See B. N. A. Act, 1871, and the Orders in Council admitting P. E. Island and Brit. Columbia to the Union, *post*.

[4] As to the Senate, see notes to s. 21, *ante*, p. 113.

[5] See *post*.

[6] See, however, the notes to s. 51, *post*. Consequent upon the census of 1901, there is now before parliament a bill to redistribute the representation.

Summoning of House of Commons.

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 (*f*).

Senators not to sit in 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.

Electoral districts of the four provinces

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

---

(*f*) This section would seem to carry the governor's powers no further than the Letters Patent[7] alone would have carried them, and therefore, as said by Dr. 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.[8] 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. As already pointed out[9] the word "summon" is also used in the B. N. A. Act in reference to the appointment of senators.

[7] See Appendix. The B. N. A. Act says nothing as to prorogation or dissolution.

[8] R. S. C. c. 8, s. 3.

[9] *Ante*, p. 115.

of Commons, be divided into Electoral Districts as follows:—
[*Here follows an enumeration (with reference to schedules) of the electoral districts in the provinces named. In view of what appears in note* (g) *to section 41, it appears needless to reprint this enumeration.*]

Continuance of existing election laws until Parliament of Canada otherwise provides.

41. Until the Parliament of Canada otherwise provides (*g*), 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

---

(*g*) The parliament of Canada has long since otherwise provided, and these two sections (40-41) are now therefore practically effete,[10] except in so far as they confer power to legislate upon the various matters referred to in them.

In the view of the Privy Council, the opening clause of section 41: "*Until the parliament of Canada otherwise provides;*" impliedly conferred upon the Dominion parliament full power to make laws in relation to the matters enumerated in the section, although not enumerated in any of the various sub-sections of section 91—and this, irrespective of the construction to be put upon the general words of the opening clause of section 91.

[10] 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 Vic. 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, *post*) 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 Vic. 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.

or Legislative Assembly in the several provinces, the voters at elections of such members, (*h*) the oaths to be taken by voters, the returning officers, their powers and duties, the proceed-

---

"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 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."[1]

(*h*) "*Voters at Elections.*"—By the Electoral Franchise Act[2] the preparation of Dominion voters' lists was committed to revising officers sitting in Federal courts; and it has been held that a provincial court has no jurisdiction to supervise the exercise of judicial functions in such courts. The right to vote is not a "civil right" within the meaning of section 92 (No. 13) of the B. N. A. Act.[3]

[1] Valin v. Langlois, 5 App. Cas. 115; 49 L. J. P. C. 37; 1 Cart. 158. See also *per* Ritchie, C.J., 3 S. C. R. at p. 11. 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*. See notes to section 92, No. 13, *post*.

[2] R. S. C. c. 5.

[3] Re North Perth, 21 O. R. 538, overruling *re* Simmons and Dalton, 12 O. R. 505. See further upon this subject of prohibition to federal courts, the notes to s. 92 (No. 14), *post*, p. 303.

ings at elections, the periods during which elections may be continued, the trial of controverted elections (*i*), and pro-

"Now, the group of statutes relating to the election of members of the House of Commons . . . are all of the proper competence of the Dominion. In particular, Ontario has no legislative power over the electoral franchise of the Dominion. That subject has been regulated by the parliament of Canada, and a new jurisdiction conferred for the ascertainment of duly qualified voters in and for the Dominion.

"This legislation does not trench upon 'property and civil rights in the province,' as was intimated in *Re* Simmons and Dalton, 12 O. R. 505. On the contrary, this class of legislation is contemplated and sanctioned by the 41st section of the B. N. A. Act.

"Ontario has her own like sphere of the electoral legislation provided for in section 84 of the same Act. Neither interferes with the other, because they occupy different planes of political territory, but both are essential for the efficient working of the Canadian system of dual government.

"The subjects of this class of legislation are of a *political* character, dealing with the citizen as related to the Commonwealth (whether province or Dominion), and they are kept distinct in the Federal Constitutional Act from matters of *civil* rights in the provinces, which regard mainly the *meum* and *tuum* as between citizens. It is, in my view, rather confusing to speak of the right of voting as comprehended under the 'civil rights,' mentioned in section 92, sub-section 13 of the B. N. A. Act. This franchise is not an ordinary civil right; it is historically and truly a statutory privilege of a political nature, being the chief means whereby the people, organized for political purposes, have their share in the functions of government. The question in hand, therefore, falls within the category not of 'civil rights in the province,' but of electoral rights in Canada." [4]

(*i*) *Election Trials.*—Prior to confederation the legislatures of the various provinces followed the example of the British

[4] *Per* Boyd, J., in *Re* North Perth, *ubi supra*.

ceedings 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.

---

parliament and retained in their own hands the right to decide all questions as to the *status* of their members; and for some years after Confederation both the Dominion and provincial legislatures retained this jurisdiction.

"As the House of Commons in England exercised sole jurisdiction over all matters connected with controverted elections except so far as they may have restrained themselves by statutory restrictions, the several Houses of Assembly always claimed and exercised in like manner the exclusive right to deal with and be the sole judges of election matters, unless restrained in like manner, and this claim, and the exercise of it, I have never heard disputed; on the contrary, it is expressly recognized as existing in the legislative assembly by the judicial committee of the Privy Council in Théberge v. Landry."[5]

In the judgment of the Privy Council referred to, Lord Cairns speaks of the Quebec Controverted Elections Acts of 1872 and 1875, as "peculiar in their character:"[6]

"They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating

[5] *Per* Ritchie, C.J., in Valin v. Langlois (3 S. C. R. at p. 10). See also his short historical sketch of English practice and legislation on this subject (pp. 12 and 13).

[6] Théberge v. Landry, 2 App. Cas. 102; 46 L. J. P. C. 1; 2 Cart. 1.

Writs for first election.

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.

As to casual vacancies.

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.

---

an entirely new, and up to that time unknown, jurisdiction in the particular court of the colony for the purpose of taking out, with its own consent, of the legislative assembly, and vesting in that court, that very peculiar jurisdiction which, up to that time, had existed in the legislative assembly, of deciding election petitions, and determining the *status* of those who claimed to be members of the legislative assembly."

And the committee held, in that case, that those Acts did not annex to the decisions of the tribunals constituted by them the ordinary incident of being reviewed by the Crown under its prerogative right to hear appeals from colonial courts.

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 (*j*). As to election of Speaker of House of Commons.

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. As to filling up vacancy in office of Speaker.

In a subsequent case[7] the same tribunal held that the Dominion parliament may confer upon provincial courts jurisdiction to try petitions under the Dominion Controverted Elections Act, and that "the administration of justice in the province" could not properly be construed as covering such trials.[8]

(*j*) The duties of the speaker are not defined in the B. N. A. Act, but his position (the same is true of the position of the speakers of the various legislative assemblies) is practically the same as that of the speaker of the House of Commons in England. His functions are to a certain extent of a semi-judicial nature, and he is supposed to have thrown aside all party bias upon his elevation to the chair.[9]

[7] Valin v. Langlois, 5 App. Cas. 115; 49 L. J. P. C. 37; 1 Cart. 158.

[8] The trial of controverted elections was transferred to the courts, in England in 1868; in Ontario in 1870, (34 Vic. c. 3); in Quebec in 1872 (36 Vic. c. 5); by the Dominion parliament in 1873. See also 35 Vic. c. 10 (Manitoba); Con. Stat. c. 40 (British Columbia); R. O. 1888, c. 5 (N. W. Territories); 32 Vic. c. 32 (New Brunswick); 37 Vic. c. 21 (P. E. Island); and 38 Vic. c. 25 (Nova Scotia).

[9] See Bourinot "Parl. Proc. and Prac." (2nd ed.), p. 202, *et seq.*, where will be found a succinct statement of his position and duties. By way of contrast, see Prof. Wilson's "Congressional Government" for a clear statement as to the position of the speaker of the House of Representatives at Washington. There he is supposed to exercise the powers of his office in furtherance of the aims of his political party, and is practically the leader of that party in the House; the chairmen of the various standing committees of Congress are appointed by him, and by exercising judicious selection in this respect he is able to ensure that his views upon public matters will find practical expression in the work of Congress.

Speaker to preside.

46. The Speaker shall preside at all meetings of the House of Commons.

Provision in case of absence of Speaker.

47. Until the Parliament of Canada otherwise provides (*k*), 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.

Quorum of House of Commons.

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.

Voting in House of Commons.

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 (*l*).

Duration of House of Commons.

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 (*m*).

(*k*) By 48 & 49 Vic. c. 1 there was created the office of deputy speaker with powers as defined by the statute.

(*l*) In the Senate of Canada and the Legislative Council of Quebec the speaker is entitled to vote as an ordinary member. In the House of Commons and the various provincial assemblies he has only a casting vote in case of a tie.[10]

(*m*) This is one of those matters which, it is submitted, the Dominion parliament has no power to alter; while provincial legislatures may lengthen or shorten the period of their own duration.[1]

[10] See ss. 36, 79, 87.

[1] See notes to s. 92 (No. 1).

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 (*n*), subject and according to the following rules:— Decennial Readjustment of Representation.

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

(*n*) From the debates on the Quebec Resolutions in the parliament of (old) Canada, it would appear that some uncertainty existed as to the terms of the 24th resolution. As printed in the volume of Debates on Confederation (published by authority), resolutions Nos. 23 and 24, read as follows:

"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 purpose of representation *in such local legislature,* and distribute the representation to which the province is entitled in such local legislature in any manner such legislature may see fit."

In Gray's "Confederation"—Mr. Gray was a delegate to the Conference from New Brunswick—the 24th resolution is given thus:

"The local legislature of each province may, from time to time, alter the electoral districts for the purposes of representation *in the House of Commons,* and distribute the representation to which the province is entitled in any manner such legislature may see fit."

In moving the resolutions in the House, the Attorney-General-West (Sir John A. Macdonald) said:

"A good deal of misrepresentation has arisen from the accidental omission of some words from the 24th resolution.

(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).

It was thought that by it the local legislatures were to have the power of arranging hereafter, and, from time to time, of re-adjusting the different constituencies, and settling the size and boundaries of the various electoral districts. The meaning of the resolution is simply this: that for the *first* general parliament the arrangement of constituencies shall be made by the existing local legislatures; that in Canada, for instance, the present Canadian parliament shall arrange what are to be the constituencies of Upper Canada, and to make such changes as may be necessary in arranging for the 17 additional members given to it by the constitution; and that it may also, if it sees fit, alter the boundaries of the existing constituencies in Lower Canada. In short, this parliament shall settle what shall be the different constituencies electing members to the first federal parliament. And so the other provinces,—the legislatures of each will fix the limits of their several constituencies in the session in which they adopt the new constitution. Afterwards the local legislatures may alter their own electoral limits as they please, for their own local elections. But it would evidently be improper to leave to the local legislatures the power to alter the constituencies sending members to the general legislature, after the general legislature shall have been called into existence. . . . No; after the general parliament meets, in order that it may have full control of its own legislation, and be assured of its position, it must have the full power of arranging, and re-arranging the electoral limits of its constituencies as it pleases, such being one of the powers essentially necessary to such a legislature." Confed. Deb. p. 39.

Both of these resolutions were struck out at the conference, in London, of the delegates from those provinces

(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.

---

which had agreed to the Quebec Resolutions, probably because the limits of the various constituencies had been settled by the local legislatures in the manner pointed out by Sir John Macdonald, and such arrangement was put into statutory form in section 41. Nothing appears in these 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 the above 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 re-distributions 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. This 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 bears out this construction, indicating as it does that the "fixed quantity" in the scheme of representation is the *proportionate* representation of the provinces. The electoral districts may be altered at any time

(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 (*o*) 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.

Increase of number of House of Commons.

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.

Appropriation and tax bills.

53. Bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons.

(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." As already pointed out[2] it is questionable whether this proviso has any restrictive operation as to the representation of the Territories.

(*o*) It has been contended that the Canada here referred to 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 the Supreme Court of Canada has recently negatived this view.[3]

[2] See notes to s. 37, *ante*, p. 120.
[3] Not yet reported.

Recommendation of money vote.

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 (*p*).

Royal assent to bills, etc.

55. Where a bill passed by the Houses of 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 (*q*).

(*p*) This restriction was first introduced into Canada by the Union Act, 1840.[4] It is enforced by Mr. Speaker upon point of order taken.

(*q*) "The King is, therefore, very properly a constituent part of parliament, in which capacity he possesses the means of preserving inviolate his rights and prerogatives as supreme executive magistrate, by withholding his assent at pleasure, and without stating any reason, to the enactment of provisions tending to their prejudice. It is however *only for the purpose of protecting the royal executive authority* that the constitution has assigned to the King a share in legislation; this purpose is sufficiently insured by placing in the Crown the negative power of rejecting suggested laws. The royal legislative right is not of the deliberative kind; the Crown has no power to propound laws. . . . Important therefore as this prerogative of rejection is as a shield against re-

[4] 3 & 4 Vic. c. 35, s. 57 (Imp.). See Lord Durham's Report, p. 34. The subject of money votes relates more particularly to parliamentary procedure and practice, and the subject will be found fully discussed in Sir John Bourinot's work upon that subject, 2nd ed., Chap. XVII.

Disallowance by order in Council of Act assented to by Governor-General.

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 (*r*) after the receipt thereof by the Secretary of State thinks fit to disallow the Act, such disallowance

---

bellious encroachments, as a preservative of the royal executive functions, it is in other points of view of a limited and negative nature."[5]

The exercise by the Governor-General of this discretionary power cannot be legally questioned. Doubt having been expressed as to the legal efficacy of colonial enactments when assented to by a Governor, contrary to his instructions, that doubt was set at rest by the Colonial Laws Validity Act, 1865.[6]

(*r*) At common law no such time limit existed, and this is one instance of the conversion of a common law prerogative into a statutory power.[7] The two years being allowed to pass

[5] Chitty, p. 3. Governor Cornwallis' commission (see *ante*, p. 8), frankly states the same reason for the negative voice delegated to the early governors. In those days, however, the "literary theory" prevailed which assigned to the legislative and executive departments of government not only distinct but independent powers. With the growth of the principle of responsible government in England and the colonies the negative voice allowed to the governor of a colony very largely ceased to find utterance in preservation of prerogative, and came to be employed as the up-holder, rather, of the supremacy of the Imperial parliament. And so with reference to the second negative allowed by the common law to the occupant of the throne over all acts of subordinate legislative bodies throughout the Empire: that second negative came to be exercised subject to the "conventions of the constitution" which limit the interference of the Home government with colonial legislation to matters of Imperial concern—to securing unity of national purpose and method throughout the various parts of a world-wide Empire. In other words, the true federal idea —the reconciliation of national unity with local self-government—dominates this phase of our relationship to the mother country, just as it now determines the extent to which the British parliament shall legislate as an Imperial parliament for the colonial portions of the Empire.

[6] Section 4. See Appendix.

[7] See *ante*, p. 87.

(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 (*s*).

Signification of Queen's pleasure on bill reserved.

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 (*t*).

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.

---

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.

(*s*) The power of disallowance bears no necessary relation to the question of legislative competence. As expressed by the Chancellor of Ontario[8] it "may operate in the plane of political expediency and in that of jural capacity"; but the jurisdiction of the 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.[9]

(*t*) Such assent cannot validate an *ultra vires* enactment.[10]

[8] Pardoning Power Case, 20 O. R. at p. 245; 5 Cart. at p. 546.

[9] See Mr. Lefroy's 11th Proposition. The *dicta* are largely in reference to the disallowance of provincial statutes, as to which see notes to s. 90, *post*.

[10] See note to s. 56, *supra*.

V.—Provincial Constitution (*u*).

Executive Power.

Appointment of Lieutenant-Governors of Provinces.

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.

(*u*) In dealing with those sections (58 to 90) of the B. N. A. Act which make provision for the provincial constitutions, the scheme propounded by the Quebec Resolutions [1] must be borne in mind. One cause of the support given in the two parts of (old) Canada to the federation proposal was that it severed the tie of legislative union between them. The carrying out of this design and the larger federal scheme in one Act necessitated, first, the severance of that tie, and then the creation of a federal union of four provinces. Old Canada being thus divided into its original component parts (with new names), new governmental machinery, legislative and executive, had to be provided for Ontario and Quebec. Eliminate from the B. N. A. Act all clauses inserted to this end,[2] and it then clearly appears as an Act establishing federal machinery and connection only, defining the line of division for legislative purposes between the federal and local governments, and assigning to the federal government certain portions of the assets and revenue producing powers of the federating provinces.[3]

Ever since the passage of the B. N. A. Act a peaceful warfare has been waged as to the position of the provinces in the Canadian constitutional system,—a conflict not yet

[1] See Appendix.

[2] *E.g.*, ss. 63 and 65 (as to the executive machinery) and ss. 69 to 87 both inclusive (as to the constitution of the legislatures of Ontario and Quebec). Section 89, now effete, is silent as to New Brunswick, because of the provision made in the last clause of s. 88. See notes to s. 88, *post*.

[3] See the Liquidator's Case, fully quoted *infra*. The Orders in Council admitting British Columbia and P. E. Island to the Canadian Union, simply continue the previous constitutions, executive and legislative, of those provinces. For Manitoba, of course, new machinery was provided; see *post*.

perhaps ended but now become hopeless to those who would deny the full autonomy of the provinces in relation to all matters committed to the legislative authority of the provincial assemblies. Within the limits of subjects and area[4] as defined by the B. N. A. Act, the legislative power of these assemblies is exclusive and supreme.[5] Within those limits they possess full control of the executive government of the provinces,[6] and may deal as they think fit with the Crown's prerogatives in relation to provincial matters.[7] And even those prerogatives which have not been made the subject of statutory regulation are to be exercised by the Lieutenant-Governors as the Crown's representatives in the provinces so far as they are capable of exercise in relation to provincial government.[8] This, according to the weight of judicial opinion, is the result of the decision of the Privy Council in the Liquidators' Case.[9] The particular 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; but the committee's judgment deals with the general question and affirms with final authority the full autonomy of the provinces:

"The Supreme Court of Canada had previously ruled in Reg. v. Bank of N. S.[10] that the Crown, as a simple contract creditor for public moneys of the Dominion deposited with a provincial bank, is entitled to priority over other creditors of equal degree. The decision appears to their Lordships to be in strict accordance with constitutional law. The property and revenues of the Dominion are vested

[4] As to the territorial limitation, see *ante*, p. 62 *et seq.*

[5] Hodge's Case, 9 App. Cas. 117; 53 L. J. P. C. 1; 3 Cart.144; Liquidator's Case, (1892) A. C. 437; 61 L. J. P. C. 75; 5 Cart. 1. See *ante*, p. 57 *et seq.*

[6] Pardoning Power Case, 23 S. C. R. 458; 5 Cart. 517; Q. C., Case, (1898) A. C. 247; 67 L. J. P. C. 17. And see *ante*, p. 89.

[7] Exchange Bank v. Reg., 11 App. Cas. 157; 55 L. J. P. C. 5, and cases in last note.

[8] See *ante*, p. 89, where the subject is more fully discussed. It touches Dominion executive government as well as provincial.

[9] *Ubi supra.*

[10] 11 S. C. R. 1; 4 Cart. 391.

in the Sovereign subject to the disposal and appropriation of the legislature of Canada; and 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.[1] In Exchange Bank of Canada v. Reg.,[2] this Board disposed of the appeal on that footing, although their Lordships reversed the judgment of the court below, and negatived the preference claimed by the Dominion government, upon the ground that by the law of the province of Quebec the prerogative was limited[3] to the case of the common debtor being an officer liable to account to the Crown for public moneys collected or held by him. The appellants did not impeach the authority of these cases, and they also conceded that, until the passage of the B. N. A. 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. Their Lordships do not think it necessary to examine in minute detail the provisions of the Act of 1867, which nowhere professed to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces. 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, intrusted 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

[1] See *ante*, p. 86.
[2] 11 App. Cas. 157; 55 L. J. P. C. 5.
[3] See *ante* p. 87.

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. But, in so far as regards those matters which by section 92 are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion and as supreme as it was before the passing of the Act. In Hodge v. Reg.,[4] Lord Fitzgerald, delivering the opinion of this Board, said: 'When the B. N. A. 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.' 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 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.

[4] 9 App. Cas. 117; 53 L. J. P. C. 1; 3 Cart. 144.

Tenure of office of Lieutenant-Governor.

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

---

"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." [5]

[5] As to the view taken of the scope of this judgment on the question of executive power, see the notes to s. 9, *ante*, p. 91, *et seq.*

of the Parliament of Canada shall not be removable within five years from his appointment, except for cause assigned (*v*), 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.

Salaries of Lieutenant-Governors.

60. The salaries of the Lieutenant-Governors shall be fixed and provided by the Parliament of Canada.

Oaths, etc., of Lieutenant-Governor.

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.

(*v*) In two instances only has the power of removal been exercised, viz.: in the case of Lieutenant-Governor Letellier, of Quebec (1879), and of Lieutenant-Governor McInnes, of British Columbia (1899). In the earlier case[6] the Governor-General was instructed by the Imperial authorities to act, in cases under this section, upon the advice of his Canadian ministers.

[6] See Todd, "Parl. Gov. in Brit. Col.," 405, *et seq.* The cause assigned in the order for the removal of Lieutenant-Governor Letellier was that, after the vote of the houses of the Dominion parliament censuring him for the dismissal of his ministers, his usefulness as a Lieutenant-Governor was gone. Is the vote of the houses of the Dominion parliament an element of "cause"? If so, a Lieutenant-Governor is subject to the vote of a parliament which cannot enact a single law to govern his conduct in the administration of the affairs of the province over which he presides. On the other hand, if the Governor-General is to act upon the advice of his ministers, they must tender such advice under full responsibility to parliament, and, through parliament, to the Canadian electorate. They seem to be in the same position in reference to the disallowance of provincial statutes; executive power in these matters is divorced from legislative jurisdiction. And so as to the power to appoint certain of the judges: see notes to s. 92, No. 14, *post*.

Application of provisions referring to Lieutenant-Governor.

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.

Appointment of executive officers for Ontario and Quebec.

63. The Executive Council (*w*) 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, with, in Quebec, the Speaker of the Legislative Council and the Solicitor-General.

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, (*x*) continue as it exists at the Union until altered under the authority of this Act.

(*w*) Members of the Executive Council are not answerable to courts of law for acts done by them in the performance of their official duties.[7]

(*x*) "*Subject to the provisions of this Act.*"—That is to say, subject to the change in the mode of appointment of the executive head of the province, and subject also to those provisions of the B. N. A. Act which limit the provincial

[7] Molson v. Chapleau, 3 Cart. 360. This subject is, however, while no doubt a question of constitutional law, so fully treated of by other writers, that it is not deemed advisable to enter upon it here. See Broom, 'Constitutional Law," 521, *et seq.*; Forsyth's Opinions on Constitutional Law, 85; Lefroy, 97; and see also Muskoka Mill Co. v. The Queen, 28 Grant, 563; O'Brien v. The Queen, 4 S. C. R. 529; *Re* The Massey Manufacturing Co., 13 O. A. R. 446; and *Re* Bell Telephone Co., 9 O. R. 339.

Powers to be exercised by Lieutenant-Governor of Ontario or Quebec with advice or alone.

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 exerciseable 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 (*y*).

---

sphere of authority. These are the only provisions of the Act which in any way limit the full operation of this section.[8]

(*y*) No such provision is made in reference to Nova Scotia and New Brunswick, nor in the Orders in Council admitting Prince Edward Island and British Columbia to the Domin-

[8] Unless perhaps the group of clauses which deal with the division of assets may be said to be provisions relating to the provincial constitutions. See particularly the cases as to the meaning of the word "royalties," in s. 109. As to the early constitutions of the Maritime Provinces, see *ante*, p. 2 *et seq.*

Application of provisions referring to Lieutenant-Governor in Council.

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 (*z*).

---

ion.[9] Owing to the division of (old) Canada into Ontario and Quebec it was necessary to provide for the exercise of the powers, etc., which had theretofore been conferred by statute upon the Governor or Lieutenant-Governor of the old provinces. By section 12, *all* such powers are vested in the Governor-General so far as the same are capable of being exercised in relation to the government of Canada; by this section, the very same powers, in their entirety, are vested in the Lieutenant-Governors of Ontario and Quebec respectively. The two sections, taken together, effect no division of power, but provide simply for the exercise of the same powers in the different spheres of authority created by the B. N. A. Act.[10]

(*z*) The only powers which a Lieutenant-Governor may exercise otherwise than by Order in Council, are those confer-

[9] See notes to s. 58, *ante*, p. 136.

[10] In Gibson v. McDonald, (7 O. R. 401; 3 Cart. 319), Mr. Justice O'Connor referred to a slight difference in the wording of this section as compared with section 12—the words "as far as the same continue in existence," which appear in the 12th section, being omitted from this 65th section—indicating, in his opinion, that some powers continued to exist in relation to the Dominion, and were vested therein, which did not continue to exist in relation to the provinces. *Sed quære.* The fact that the B. N. A. Act does effect a clear division of the sphere of authority seems not to have been appreciated in Regina v. Amer, (42 U. C. Q. B. 391; 1 Cart. 722), where Mr. Justice Wilson treats these two sections as vesting the same power in the Governor-General and a Lieutenant-Governor in *reference to the same subject matter*. In view of the subsequent discussions which have taken place in reference to the scheme of the B. N. A. Act, the words italicized would seem to be an incorrect construction of these two sections. For other cases in which this section is referred to: see Atty.-Gen. (Que.) v. Reed, 10 App. Cas. 141; 54 L. J. P. C. 12; 3 Cart. 190; Lenoir v. Ritchie, 3 S. C. R. 575; 1 Cart. 488; Pardoning Power Case, 23 S. C. R. 458; 5 Cart. 517; Q. C. Case, (1898), A. C. 247; 67 L. J. P. C. 17; 23 O. A. R. 792. See also the notes to s. 9, *ante*, p. 89, as to the exercise of powers other than statutory.

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 (*a*). Administration in absence, etc., of Lieutenant-Governor.

---

red:—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, the "conventions of the constitution"[1] require 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 in-coming 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 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.

(*a*) Section 14 (*ante*) (coupled with the Letters Patent) empowers the Governor-General to appoint a Deputy Governor-General. This section, it will be noticed, conveys no such power to a Lieutenant-Governor, and as to him, therefore,

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

Seats of Provincial Governments.

68. Unless and until the Executive Government (*b*) 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 (*c*).

---

the maxim *delegatus non potest delegari* applies. Section 92 (*post*) expressly prohibits a provincial legislature from amending the provincial constitution "as regards the office of Lieutenant-Governor."[2]

(*b*) "*The executive government.*"—This is a somewhat peculiar provision. The idea probably was to provide for a change of the seat of government upon a sudden emergency which might not allow of the calling together of the legislature. There is no doubt, however, that this is one of those clauses relating to the provincial constitution which may be altered by the legislature of a province under section 92, No. 1. A provincial assembly, therefore, may, if so minded, take from the executive this power.

(*c*) The seats of government of the provinces and territories acquired since Confederation are as follows:

Of Manitoba, Winnipeg; of the North-West Territories, Regina; of Prince Edward Island, Charlottetown; of British Columbia, Victoria; and of the Yukon Territory, Dawson.

[2] A provincial legislature may confer upon a Lieut.-Governor executive functions "germane to the office," (*per* Boyd, C., in the Pardoning Power Case, 20 O. R. 222; 5 Cart. 517; and see the Q. C. Case, (1898), A. C. 247; 67 L. J. P. C. 17); but any general delegation by him of the duties of his office would seem contrary to the spirit of the Federation Act. See particularly sec. 59.

Legislative Power (*d*).

1.—ONTARIO.

69. There shall be a Legislature for Ontario consisting of the Lieutenant-Governor (*e*) and of one House (*f*), styled the Legislative Assembly of Ontario. Legislature for Ontario.

(*d*) The heading of this sub-division of Part VI. is not quite accurate.[3] Sections 69 to 90 treat of the legislative machinery in the various provinces. Incidentally some of these sections confer legislative power;[4] but the main distribution of legislative powers between the Dominion and the provinces is effected by sections 91 to 95.

(*e*) It is now authoritatively settled that the Crown is a party to provincial legislation, the Lieutenant-Governor representing the British Sovereign as a constituent branch of the assembly.[5]

(*f*) This form of legislature was the deliberate choice of the Upper Canada representatives in the old parliament of Canada. Lower Canada (now Quebec) chose the bi-cameral form.[6] Nova Scotia and New Brunswick prior to Confederation had that form, and the constitution of the legislatures in those provinces was continued by the B. N. A. Act.[7] Prince Edward Island was in like position upon its admission in 1873. Upon the formation of the province of Manitoba a second chamber was established, but this was afterwards abolished by an Act of the Manitoba legislature[8] under the powers conferred by section 92, No. 1. At the time of its admission to the Union, British Columbia had a legislature

[3] There is the same inaccuracy in the heading of Part IV.: see *ante*, p. 103.

[4] See ss. 72, 78, 80, 83, 84, read in the light of the note to s. 41, *ante*, p. 122.

[5] Liquidators' Case: see extract *ante*, p. 137.

[6] Section 71, *post*.

[7] Section 88, *post*.

[8] 39 Vic. c. 29 (Man.).

Electoral districts.

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 (*g*).

2.—QUEBEC.

Legislature for Quebec.

71. There shall be a Legislature for Quebec consisting of the Lieutenant-Governor and of two Houses (*h*), styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

Constitution of Legislative Council.

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.

---

somewhat similar to that of Ontario, consisting of one house only.[9]

(*g*) The representation in the different provincial legislatures has from time to time since 1867 been altered, under the power granted to the provincial legislatures by section 92, (No. 1), so that the schedules of electoral districts need not be printed.

(*h*) Quebec still adheres to the bi-cameral form. The various sections relating to the legislature of that province may be compared with the sections relating to the parliament of Canada. The proviso to section 80 was intended to safeguard the interests of the Protestant minority; the electoral districts referred to are, or were in 1867, inhabited largely by Protestant English and are familiarly known as the Eastern Townships.

[9] As to the "privileges, immunities, and powers," of a provincial assembly and its members; see notes to s. 18, *ante*, p. 104 *et seq.*

Qualification of Legislative Councillors.

73. The qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec.

Resignation, Disqualification, etc.

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.

Vacancies.

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.

Questions as to vacancies, etc.

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.

Speaker of 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.

Quorum of Legislative Council.

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.

Voting in Legislative Council.

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.

Constitution of Legislative Assembly of Quebec.

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 Legis-

lature 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 bill 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.

First Session of Legislatures.

81. The Legislatures of Ontario and Quebec respectively shall be called together not later than six months after the Union.

Summoning of Legislative Assemblies.

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.

Restriction on election of holders of offices.

83. Until the Legislature of Ontario or of Quebec otherwise provides (*i*), 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 Coun-

---

(*i*) The matters referred to in this section have been the subject of legislation in all the provinces.

cil of the respective Province (*j*), 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 (*k*).

Continuance of existing election laws.

84. Until the Legislatures of Ontario and Quebec respectively otherwise provide (*l*) 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

---

(*j*) Prior to Confederation this was the law in all the provinces and upon it hinges the difference between the British and United States constitutional systems.[10]

(*k*) This proviso is a reminder of the days when "the King's party" was accustomed to recruit its ranks by a lavish distribution of office.[1] It applies even to the acceptance of office by members of a new administration after a general election.[2]

(*l*) Were it not that the power of the provincial legislatures to deal with the various matters referred to in this section may perhaps depend thereon, it might be said to be effete, as the legislatures of all the provinces have long since otherwise provided.[3]

[10] See *ante*, p. 21.

[1] May "Const. Hist. of Eng.," (3 vol. ed.), Vol. I., p. 369, *et seq.*

[2] See McDonell v. Smith, 17 U. C. Q. B. 310, and Macdonell v. Macdonald, 8 U. C. C. P. 479, which upheld as legal what is popularly known in Canadian history as the "double shuffle" of 1858.

[3] See the notes to s. 41, *ante*, p. 122. All that is there laid down applies, *mutatis mutandis*, to the case of the provincial election laws.

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.

Duration of Legislative Assemblies.

85. Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for four years (*m*) 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.

Yearly Session of Legislature.

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 Legislaure in each Province in one session and its first sitting in the next session (*n*).

(*m*) The legislature of a province may alter the law in this regard. The federal parliament cannot, it is submitted, alter the provisions of the B. N. A. Act relating to its constitution unless expressly so empowered.[4]

(*n*) There is no similar provision in the Act as to Nova Scotia or New Brunswick, and apparently no such limitation is imposed by law in those provinces.[5]

[4] See s. 50, *ante*, p. 128. The subject is discussed more fully in the notes to s. 92 (No. 1), *post*.

[5] See note to s. 20, *ante*, p. 110.

87. The following provisions 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 (*o*). Speaker, quorum, etc.

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 (*p*), 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. Constitutions of Legislatures of Nova Scotia and New Brunswick.

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 First elections

---

(*o*) The provisions referred to are contained in sections 44 to 49, *ante*. Upon most of these matters the various provincial legislatures have exercised their legislative power, under section 92 (No. 1) *post*.

(*p*) "*Subject to the provisions of this Act.*"—That is to say, subject to the limitation of the sphere of authority of the legislatures in these provinces under the B. N. A. Act, and subject also to the difference in the mode of appointment of the Lieutenant-Governor. In all other respects, the constitutions of these provinces may be, from time to time, altered by the provincial legislatures, under the terms of section 92 (No. 1). As it happened, the assembly of Nova

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 sub-division 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.

Application to Legislatures of provisions respecting money votes, etc.

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 (*q*).

Scotia had been dissolved just prior to the passing of the B. N. A. Act and consequently section 89 makes for that province the same provision as was made for the first post-Confederation elections in Ontario and Quebec.

(*q*) The provisions referred to are contained in sections 53 to 57, *ante*. The only one calling for more extended reference here is the provision relating to the disallowance of provincial Acts. The right to exercise the Crown's prerogative in this regard[6] is by this section taken from the King in Council and is conferred upon the Governor-General in Council; a matter frequently adverted to as indicating the very extended rights of self-government accorded to Canada by the B. N. A. Act.

[6] See *ante*, p. 134.

This is, perhaps, the proper place to advert to a strange error into which Prof. 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 a strange lack of appreciation of the true position of affairs.[7] To confine attention, however, to this particular error: Prof. 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.

[7] "The Law of the Constitution." The first chapter of Prof. 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."

"The futility of a hope grounded on a misconception of the nature of federalism," is a strong expression,[8] and contains a very direct charge that the Fathers of Confederation did not know what they were about in this matter. One who, like Prof. 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,[9] 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 B. N. A. Act is founded, was the work of the most eminent legal minds of that day in Canada; and a glance at

[8] To charge the men who had in hand the framing of the scheme of Confederation with "misconception of the nature of federalism" comes with rather bad grace from Prof. 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, the Professor 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 this he is clearly astray. 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.

[9] The Pardoning Power Case, 20 O. R. at p. 245; 5 Cart. at p. 546.

the debates upon these Resolutions will show that they thoroughly appreciated the distinction pointed out in these 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 the following 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[10] 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.

"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*.[1]

[10] Hon. A. A. Dorion; afterwards Sir A. A. Dorion, Chief Justice of Quebec. See Confed. Deb., p. 690.

[1] 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.

"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. The power in each case is subject to the limitations prescribed by those "conventions of the constitution" to which Prof. Dicey so frequently refers. 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 section 91 of the B. N. A. Act. And with regard to the disallowance by the governor in council of provincial Acts, the exercise of this power by reason of the provincial Act being thought *ultra vires,* has largely ceased, and the supervision now works chiefly "in the plane of political expediency."

The existence of the *veto* power has no relation whatever to the question of legislative competence.[2] 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 no one of the parts can pass laws for itself, except under the control of the whole acting through the Governor-General."[3]

[2] Leprohon v. Ottawa, 2 O. A. R. 522; 1 Cart. 592; Reg. v. Chandler, 1 Hannay (N.B.), 558; 2 Cart. 437. See also, *ante*, p. 135; and Brophy's Case, *ubi supra*.

[3] Lambe's Case, 12 App. Cas. 575; 56 L. J. P. C. 87; 4 Cart. 7.

Upon the expiration of the two years allowed by section 56 for the disallowance by the King in Council of Dominion legislation, no Act of Imperial executive authority can thereafter weaken its effect; nothing short of "repugnant" Imperial legislation can override it.[4] 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 section 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.[5] This is the latest pronouncement on the vexed question of concurrent legislative powers. 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.

[4] See *ante*, pp. 134-5.

[5] The Local Prohibition Case; see extract quoted *post*, p. 179.

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 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.

VI. Distribution of Legislative Powers. (*a*)

Powers of the Parliament.

Legislative authority of Parliament of Canada.

91. It shall be lawful for the Queen, by and with the 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

---

(*a*) *Legislative Jurisdiction, Executive Power, and Proprietary Rights.*

Legislative jurisdiction and executive power go hand in hand.[6] 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 line of division for purposes of executive government.[7] These sections, therefore, of the B. N. A. Act (91 to 95) which distribute legislative power are the pivotal clauses upon which the scheme of Confederation turns.[7a]

[6] This question is discussed in the notes to s. 9, *ante*, p. 89. One of the earliest expressions of this view as to the present federal form of government is that of the late master in chambers, Ont., (Mr. R. G. Dalton, Q.C.), in Reg. v. Pattee, 5 P. R. 297.

[7] In the matter of the appointment of provincial Lieut.-Governors (s. 58), the Dominion executive is "a governing body who have no powers and no functions except as representatives of the Crown:" Liquidators' Case, (1892), A. C. 437; 61 L. J. P. C. 75: 5 Cart. 1. And so, it is submitted, as to the disallowance of provincial Acts (s. 90), and the appointment of certain judges (s. 96). See notes to s. 58, *ante*, p. 140, and to No. 14 of s. 92, *post*.

[7a] For convenience of reference and comparison, ss. 91 and 92 are printed side by side on the two preceding pages. 160 and 161.

On the other hand, there is a marked distinction between legislative jurisdiction and proprietary rights. These sections (91 to 95) deal only with the distribution of legislative power and "there can be no *a priori* probability that the British legislature in a branch of the statute which professes to deal 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."[8] 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."[9] And so as to "fisheries"[10] and ferries;[1] 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 these particular subjects,[2] although of course, the exercise of such legislative power may materially affect the proprietary rights of individuals or of the provinces.[3]

The Scheme of Distribution.

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

[8] St. Catherines Milling Co. v. Reg., 14 App. Cas. 46; 58 L. J. P. C. 59; 4 Cart. 107.

[9] *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. ; 72 L. J. P. C. 5. See notes to s. 91 (No. 24), *post*.

[10] Fisheries Case, (1898), A. C. 700; 67 L. J. P. C. 90. See notes to s. 91 (No. 12), *post*.

[1] Perry v. Clergue, (1903) 5 O. L. R. 357. See notes to s. 91, No. 13, *post*.

[2] Compare Western Counties Ry. v. Windsor & A. Ry., 7 App. Cas. 178; 51 L. J. P. C. 43; 1 Cart. 397; in which the P. C. declined to express an opinion as to the power of the Dominion parliament to enact the extinguishment of certain contractual obligations to which the government railway in question was subject at the time of its transfer by the B. N. A. Act (s. 108) from Nova Scotia to Canada. See notes to s. 108, *post*.

[3] Fisheries Case, *ubi supra*. See notes to s. 91 (No. 12), *post*.

have been intended;[9] the Act is clear that the jurisdiction in each case is exclusive;[10] 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.*"[1]

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.[2]

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

[9] Parsons' Case, 7 App. Cas. 96; 51 L. J. P. C. 11; 1 Cart. 265; and see *per* Mackay, J., in *Ex p.* Leveille, (1877). 2 Steph. Dig. at p. 446; 2 Cart. at p. 349.

[10] See *ante*, p. 37.

[1] *Per* Gwynne, J., in Frederickton v. Reg., 3 S. C. R. 505; 2 Cart. 27. See also Parsons' Case, 4 S. C. R. at p. 330.

[2] See *post*, p. 169-70. 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.

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[4] deducible from the judgments of the 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.[5]—Section 91 is thus referred to:

"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.[6] 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."[7]

[3] Parsons' Case, 7 App. Cas. 96; 51 L. J. P. C. 11; 1 Cart. 265. The latest reference 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."

[4] See *post*, p. 181 *et seq.*

[5] L'Union St. Jacques v. Belisle, L. R. 6 P. C. 31; 1 Cart. 63. See notes to s. 91 (No. 21), and s. 92 (No. 16), *post*.

[6] See Lefroy, 549 (n1), where *dicta* of Canadian judges as to the general character of the subjects committed to the cognizance of the Dom. Parl. are collected.

[7] If the language above quoted is to be taken literally, "private bills" legislation by the federal parliament would be entirely precluded. Such legislation, however, is recognized in Colonial Bld'g Ass'n v. Atty.-Gen. (Que.), 8 App. Cas. 157; 53 L. J. P. C. 27; 3 Cart. 118; Parson's Case, 7 App. Cas. 96; 51 L. J. P. C. 11; 1 Cart. 265; Quirt v. Reg., 19 S. C. R. 510; 5 Cart. 456; and many other cases. In fact it has never been seriously questioned and is of yearly occurrence. Under one of the classes of s. 91 (No. 26, "divorce"), legislation has so far been exclusively of this sort. The above passage has, nevertheless, never been adversely criticized in any subsequent judgment of the Privy Council.

1875.[8]

"Sections 91 and 92 purport to make a distribution of legislative power between the parliament of Canada and the 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."[9]

1879.[10]

"If the subject matter is within the jurisdiction of the Dominion parliament it is not[1] within the jurisdiction of the provincial parliament, and that which is excluded by the 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."

1880.[2]

"By section 91 exclusive legislative authority in certain matters is conferred upon the parliament of Canada, and by section 92 exclusive authority in certain others upon the provincial legislatures. . . .

[8] Dow v. Black, L. R. 6 P. C. 272; 44 L. J. P. C. 52; 1 Cart. 95. See notes to s. 92 (Nos. 10 and 16).

[9] This passage is little more than a paraphrase of the opening clause of s. 91, emphasizing, perhaps, the exhaustive character of the distribution effected by the B. N. A. Act, the entire *residuum* of legislative power being lodged with the federal parliament. Lambe's Case (see extract quoted *post*, p. 174) contains the final pronouncement upon this point. See, however, *ante*, p. 106 as to the constituent powers of certain of the provincial legislatures under the Colonial Laws Validity Act, 1865.

[10] Valin v. Langlois, 5 App. Cas. 115; 49 L. J. P. C. 37; 1 Cart. 158. See notes to s. 40. *ante*, p. 122.

[1] In view of subsequent decisions as to "ancillary" legislation, particularly the Voluntary Assignments Case (see extract, *post*, p. 175), Mr. Lefroy here interpolates the words "in its entirety:" "Leg. Power in Can.," 347. The Fisheries Case (see extract *post*, p. 180) indicates the way to reconcile these difficulties. The question is really as to the true character of the legislation. See *post*, p. 193, where the subject is more fully discussed.

[2] Cushing v. Dupuy, 5 App. Cas. 409; 49 L. J. P. C. 63; 1 Cart. 252. See notes to s. 91 (No. 21), *post*.

"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, so far as a general law relating to those subjects might affect them." [3]

1881.[4]

"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 the 91st section had stopped here, and if the classes of subjects enumerated in section 92 had been altogether distinct

[3] In Atty.-Gen. (Que.) v. Queen Ins. Co., 3 App. Cas. 1090; 1 Cart. 117, Jessel, M.R., had suggested the possibility of "concurrent powers." The question first assumes practical shape before the P. C. in Cushing v. Dupuy, *supra*. As succeeding extracts will show it has since been constantly to the front. The subject is discussed *post*, p. 183.

[4] Parsons' Case, 7 App. Cas. 96; 51 L. J. P. C. 11; 1 Cart. 265. See notes to s. 91 (No. 2), *post*.

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.[5]

"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

[5] Now held otherwise. The paragraph "correctly describes" and was meant to cover all the classes of s. 92; see extract from the Prohibition Case, *post*, p. 176.

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.[6] 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.*[7] 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 exclus-

[6] Their Lordships adhered to this view in Lambe's Case, 12 App. Cas. 575; 56 L. J. P. C. 87; 4 Cart. 7. See notes to s. 92 (No. 2), *post*.

[7] Quoted with approval in Russell v. Reg., noted *post* p. 171. This rule of interpretation is discussed and illustrated *post*, p. 196-7.

ively 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.*" [8]

* * * * * * *

" 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." [9]

* * * * * * *

" Having taken this view of the present case[10] it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce when com-

[8] The italicized passages constitute the essential distinction between the formula already quoted (*ante*, p. 164) and the method of enquiry adopted by the Privy Council. The formula of Mr. Justice Gwynne did away with the third enquiry and, as a necessary consequence, with all necessity for a reconciliation of the various classes enumerated in ss. 91 and 92, respectively. The statute impugned in Parsons' Case was a provincial Act, but in Russell v. Reg., (7 App. Cas. 829; 51 L. J. P. C. 77; 2 Cart. 12). the very same method of enquiry was adopted in reference to a Dominion Act, and has since been reaffirmed by the same tribunal as proper in regard to both Dominion and provincial legislation. The propriety of this method of enquiry was finally established when the exhaustive character of the division effected by the B. N. A. Act was definitely enunciated in Lambe's Case, 12 App. Cas. 575; 56 L. J. P. C. 87; 4 Cart. 7.

[9] Applying this to the case in hand, their Lordships held that " civil rights " (s. 92. No. 13) include rights arising under contracts, excepting only those particularized in s. 91, *e.g.*, bills of exchange and promissory notes. The rule that a general class is to be limited so as to exclude a particular named class which would ordinarily be included in it, is discussed *post*, p. 198.

[10] Viz., that the Ontario Act providing for uniform conditions in fire insurance policies is not a " regulation of trade and commerce " within the meaning of s. 91 (No. 2).

petently exercised by the Dominion parliament might legally modify or affect property and civil rights in the provinces or the legislative power of the provincial legislatures in relation to those subjects; questions of this kind, it may be observed, arose and were treated of by this Board in the cases of L'Union St. Jacques v. Belisle,[1] and Cushing v. Dupuy." [2]

1882.[3]

After examining the general features of the Canada Temperance Act, 1878, the judgment of the Privy Council proceeds:

"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,[4] 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 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;[5] 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

[1] See extract, *ante*, p. 165.

[2] See extract, *ante*, p. 167. See also the extract from Tennant v. Union Bank, *post*, p. 174. It is again the question of "concurrent powers," discussed *post*, p. 183.

[3] Russell v. Reg., 7 App. Cas. 829; 51 L. J. P. C. 77; 2 Cart. 12.

[4] Russell v. Reg. is now based solely upon the "peace, order, and good government" clause of s. 91; see the Local Prohibition Case, (1896), A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295.

[5] It is now held that legislation under the "peace, order, and good government" clause of s. 91 cannot trench upon the enumerated classes of s. 92, other than No. 16; see *post*, p. 177, 187.

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.[6] It is therefore unnecessary to discuss the considerations which a state of circumstances of this kind might present."

* * * * * * *

1883.[7]

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 Parson's case illustrate is 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.*"[8]

1887.[9]

"Their Lordships have been invited . . . to apply to the construction of the Federation Act the principles

[6] But see the Local Prohibition Case, (1896), A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295; and the Manitoba Liquor Act Case, (1902), A. C. 73; 71 L. J. P. C. 28.

[7] Hodge's Case, 9 App. Cas. 117; 53 L. J. P. C. 1; 3 Cart. 144. This case finally affirmed the right of the provinces to issue licenses for the sale of liquors, and to impose regulations upon the licensees. The question as to prohibition as distinguishable from regulation has only recently been settled; see the Privy Council's statement as to the present position: Manitoba Liquor Act Case, (1902), A. C. 73; 71 L. J. P. C. 28.

[8] This principle is discussed and illustrated, *post*, p. 193. Properly applied it goes far to solve the vexed question as to "concurrent powers."

[9] Lambe's Case, 12 App. Cas. 575; 56 L. J. P. C. 87; 4 Cart. 7.

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.[10] 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. 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.

* * * * * * *

[10] 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 U. S. constitution conferring power upon Congress "to make all laws which shall be necessary and proper for carrying into execution" the enumerated powers. See Atty.-Gen. (Que.) v. Queen Ins. Co., (1878), 22 L. C. Jur. 309; 1 Cart. 134; *per* Ramsay, J.; Reg. v. Gold. Comm., 1 B. C. (pt. 2) 260, *per* McCreight, J.

"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." [1]

1894.[2]

"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

[1] See *post*, p. 181.

[2] Tennant v. Union Bank. (1894) A. C. 31; 63 L. J. P. C. 25; 5 Cart. 244; involving the question as to the validity of certain provisions of the Bank Act (Dom.), in reference to warehouse receipts. See notes to s. 91, No. 15, *post*. The principle of this decision is stated in the Local Prohibition Case: see extract, *post*, p. 176.

strictly relates[3] 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.[4] . . . The power to legislate conferred by that clause (91) may be fully exercised, although with the effect of modifying civil rights in the province."

1894.[5]

"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 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."[6]

[3] The courts must decide this? See *post*, p. 187.

[4] And Cushing v. Dupuy (*ubi supra*, p. 167) is cited as another illustration founded upon the necessities of "bankruptcy and insolvency" legislation. See s. 91, No. 21; and contrast the Voluntary Assignments Case from which the next extract is taken.

[5] Voluntary Assignments Case, (1894), A. C. 189; 63 L. J. P. C. 59; 5 Cart. 266. Principle of decision stated: Local Prohibition Case; see extract *post*, p. 176. Distinguished: Fisheries Case; see extract, *post*, p. 180.

[6] Again the question of "concurrent powers," discussed, *post*, p. 183.

1895.[7]

"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[8] 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[9] to the exercise

[7] Local Prohibition Case, (1896) A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295. Principle of decision stated: Man. Liquor Act Case, (1902), A. C. 73; 71 L. J. P. C. 28. This is the first general survey of the scheme of distribution effected by ss. 91 and 92, made by the Privy Council since Parsons' Case. A comparison of the two judgments discloses a marked advance, particularly toward a solution of the ever-recurring question as to "concurrent powers."

[8] See extract, *ante*, p. 168. The view then taken was supported by Dow v. Black (L. R. 6 P. C. 272; 44 L. J. P. C. 52; 1 Cart. 95); and in L'Union St. Jacques v. Belisle (L. R. 6 P. C. 31; 1 Cart. 63) the reporter puts "matters of a local or private nature" in inverted commas as a quotation from No. 16 of s. 92.

[9] The courts must decide this? See *post*, p. 187.

of the powers conferred upon it by the enumerative heads of clause 91." [10]

* * * * * * *

"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.[1] 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,[2] and

[10] Parsons' Case and Cushing v. Dupuy are cited as cases in which the above view was stated and illustrated; and Tennant v. Union Bank and the Voluntary Assignments Case as cases in which the principle had been recognized by the board. See extracts from these cases, *ante*, pp. 167, 167, 174, 175.

[1] Except upon No. 16, as this judgment shows later. It was argued that the Canada Temperance Act of 1886 "occupied the whole possible field of legislation in either aspect so as completely to exclude legislation by a province," and this question of fact was stated to be the real point of controversy. Then follows the passage (see *post*, p. 179) in which it is stated as settled law that Acts of the Dominion parliament when *intra vires* must override provincial legislation. The subject is more fully discussed, *post*, p. 187.

[2] The courts must decide this? See *post*, p. 187.

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,[3] there is hardly a subject enumerated in section 92 upon which it might not legislate to the exclusion of the provincial legislatures."

* * * * * * * * *

"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."[4]

* * * * * * * * *

"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

[3] And the courts must decide? There seems to be no escape from an affirmative answer. In the Manitoba Liquor Act Case, (1902), A. C. 73; 71 L. J. P. C. 28, the point in controversy is put as a question of fact: "Is the subject of the Liquor Act a matter of a merely local nature in the province of Manitoba, and does the Liquor Act deal with it as such?" See *post*, p. 187.

[4] The courts must decide this? See *post*, p. 187.

authorized by the one or the other of these heads.[5] 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 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."

* * * * * * *

"It has been frequently recognized by this Board, and it may now be regarded as settled law that, according to the scheme of the B. N. A. 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[6] 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

[5] In the Manitoba Liquor Act Case, (1902), A. C. 73; 71 L. J. P. C. 28, such legislation is put squarely upon No. 16.

[6] Post-confederation is, of course, meant.

the Act of 1886 is repealed by the parliament which passed it." [7]

* * * * * * *

1897.[8]

"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 B. N. A. Act." [9]

[7] *I.e.*, Dominion legislation under the "peace, order, and good government" clause of s. 91 may trench upon No. 16 of s. 92, contrary to the general rule as stated in the earlier part of the judgment. This exception is again affirmed in the Manitoba Liquor Act Case, (1902), A. C. 73; 71 L. J. P. C. 28. See note *ante*, p. 177.

[8] Fisheries Case, (1898), A. C. 700; 67 L. J. P. C. 90.

[9] The Voluntary Assignment Case (*ubi supra*, p. 175) is then referred to and distinguished. "The ground of this decision was that the law in question did not fall within the class 'bankruptcy and insolvency,' in the sense in which those words were used in s. 91." The question apparently resolves itself into this: What is the true character of the Act? How should one catalogue it? See *post*, p. 193, for a discussion of this subject.

1899.[10]

"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."[1]

In the light of these authoritative deliverances of the court of last resort in Canadian cases it is possible to indicate with some precision:—

I. The main outlines of the scheme of distribution of legislative powers effected by the B.N.A. Act;

II. The position of the courts in reference to questions of legislative competence, including

(*a*) The method of inquiry to be adopted;

(*b*) The rules of interpretation to be applied.

I. *Main Outlines of the Scheme of Distribution.*

(A) *The distribution of legislative powers effected by the B. N. A. Act is exhaustive.* "Whatever is not thereby given to the provincial legislatures rests with the parliament" of Canada.[1a] There are, of course, certain matters deemed to be of imperial concern upon which neither the federal parliament, nor any provincial assembly can legislate.[2] But of the entire field of self-government allotted to Canada the B. N. A. Act works a division, assigning certain classes of matters to the provincial legislatures and the balance, the *residuum*, to the parliament of the Dominion.[3]

[10] Union Colliery Co. v. Bryden, (1899), A. C. 580; 68 L. J. P. C. 118; which involved the question as to the validity of certain anti-Chinese provincial (B.C.) legislation. Compare *Re* Tomey Homma, (1903), A. C. 151; 72 L. J. P. C. 23.

[1] Emphasizing what is stated in the extract from the Fisheries Case, *supra*, p. 180.

[1a] Lambe's Case, 12 App. Cas. 575; 56 L. J. P. C. 87; 4 Cart. 7; see extract *ante*, p. 174. Previously indicated in Dow v. Black (extract *ante*, p. 166); Valin v. Langlois (extract *ante*, p. 166); and Russell v. Reg. (extract *ante*, p. 171). See also Brophy's Case, (1895) A. C. 202; 64 L. J. P. C. 70; 5 Cart. 156; and Union Colliery Co. v. Bryden, (1899) A. C. 580; 68 L. J. P. C. 118.

[2] See *ante* p. 60 *et seq.*

[3] As to proprietary rights the position is reversed. See notes to sec. 102, *post*.

The following examples may be given of federal legislation upheld as falling within the opening residuary clause [4] of section 91, because not within any of the enumerated classes of either section 91 or section 92:—

The Canada Temperance Acts;[5]

The incorporation of companies with powers extending over the whole Dominion or over more than one province.[6]

The Dominion Acts which require a deposit to be made with the Minister of Finance by foreign companies seeking to do business in Canada.[7]

A federal Act in reference to the taking of evidence in Canada for use before foreign tribunals.[8]

The main proposition now under discussion must, it seems, be taken with this qualification, that the range of legislative power exhausted by the B. N. A. Act is the objective and not the subjective; that what are termed constituent powers are possessed by the provincial legislatures apart from the B. N. A. Act. The Privy Council has recently held that the Colonial Laws Validity Act, 1865, operates to warrant provincial legislation as to the privileges, immunities and powers of the provincial assemblies and their members.[9]

[4] As to the limits upon federal legislative power under this clause, see *post*, p. 186.

[5] Russell v. Reg., 7 App. Cas. 829; 51 L. J. P. C. 77; 2 Cart. 12; as explained in the Local Prohibition Case, (1896) A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295. See note *ante*. p. 171.

[6] Parsons' Case. 7 App. Cas. 96; 51 L. J. P. C. 11; 1 Cart. 265.

[7] *Re* Briton Medical Assn., 12 O. R. 441; 4 Cart. 646. It would seem that provincial legislatures may pass similar legislation: see notes to No. 16 of sec. 92, *post*.

[8] *Re* Wetherell v. Jones, 4 O. R. 713. The provincial legislatures, it was held, cannot pass such Acts, as in their operation they are of extra-provincial pertinence and do not relate to property and civil rights or to the administration of justice. See also *Ex p.* Smith, 16 L. C. Jur. 140; 2 Cart. 330. *Sed quære* whether provincial legislation along this line would not be valid as falling within No. 16 of sec. 92; see the notes to that item, *post*.

[9] Fielding v. Thomas, (1896) A. C. 600; 65 L. J. P. C. 103; 5 Cart. 398. See notes to sec. 18, *ante*, p. 104, and to No. 1 of sec. 92, *post*, p. 249. The point would appear to be of little practical importance as the Privy Council held that the impugned Act was also warranted by No. 1 of sec. 92.

(B) INTRA VIRES *federal legislation will override inconsistent* INTRA VIRES *provincial legislation.*[10]

It being now definitely settled that the Dominion and the provincial fields do to some extent overlap and that in reference to certain subject matters concurrent powers of legislation exist,[1] it is essential to the avoidance of a dead-lock that in such cases the legislation of one of the two bodies should be of paramount authority.[2]

[10] Local Prohibition Case, (1896) A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295; see extract *ante*, p. 179.

[1] See proposition (C) *post*, p. 186.

[2] When the 1st edition of this work appeared (1892) the question was debateable. The Privy Council had laid down that

> "If, on the due construction of the Act, a legislative power be found to fall within either section, it would be quite wrong to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the other legislature;" and 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."

In the discussion of these two propositions, the following passage occurs:—

"We deal with these two rules together because they both suggest the existence of possibly concurrent powers, probably the most perplexing question which arises under these sections of the B. N. A. Act. In order to deal intelligently with this question we must endeavor to get a clear idea of the meaning of the phrases 'conflict of laws' and 'concurrent powers.' 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 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 has come again, there cannot be in two legislative bodies concurrent powers of legislation in reference to

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. Shortly

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 B. N. A. 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 first of the two rules at the head of this paragraph would seem to indicate that in the view of the Judicial Committee of the Privy Council the absence of legislation by one legislature, Dominion or Provincial, upon the particular subject matter may increase the range open to the other. This view has to be reconciled with the use of the term 'exclusive power,' in reference to each enumeration of classes of subjects; or, if there is no possible mode of reconciliation, the view of the Privy Council must be an unsound *obiter*. The way of escape seems to be suggested by the second of the rules at the head of this paragraph. The different aspects any given subject may present have reference to the different legal relations that may arise, or (from a legislative standpoint) be created in connection with that subject. Now, these two sections of the B. N. A. Act deal with the various enumerated classes of subjects, not as divisions of facts, but as divisions of legal relations. Insolvency, for example, is not a fact at all; civil rights are not facts —both are legal relations arising out of a certain juxtaposition and co-relation of facts. Without unduly enlarging upon this theme it seems to us that a correct appreciation of this principle of division will help to make clear just in what sense legislation by one legislature (Dominion or Provincial) may lessen the range open to the other; in what sense the legislation of one may interfere with the legislation of the other. In the case from which the first of the rules now being discussed is quoted, that rule was applied to uphold the taxation of banks by provincial legislation (under section 92, sub-section 2), notwithstanding that 'banking, the incorporation of banks, and the issue of paper money' is one of the classes of subjects assigned to the exclusive ken of the Dominion parliament. Should the Dominion parliament repeal all existing laws upon this head, the legal relation—a bank—would be non-existent, could not be created by provincial legislation, and could not be seized upon, therefore, in order to attach to it the further legal relation of liability to pay taxes to the provincial treasury. And on the other hand, an excessive tax upon banks might possibly operate to prevent the co-relation of facts arising in any particular instance, upon which Dominion legislation might attach. No subject matter has been more fruitful in producing cases for decision under the B. N. A. Act than the liquor traffic. The Judicial Committee of the Privy Council has in effect held (Russell v. Reg., 7 App. Cas. 829; 51 L. J. P. C. 77; 2 Cart. 12) that the Dominion parliament may create

stated, 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;[3] while, on the other hand, the "exclusive" authority of the provincial legislatures over the 16 classes of section 92 is weakened and invasion made possible by the concluding clause of section 91,[4] and provincial legislative power though plenary is only so "subject to the provisions of section 91."[5]

such legal relations out of the facts of the liquor traffic as to prevent the creation by provincial legislation of other legal relations out of the same facts; or perhaps we should rather say, the Dominion parliament has power to prevent the facts themselves from having any existence capable of legislative recognition by a provincial legislature.

"In an earlier case the extent of the power of the Dominion parliament along the line of bankruptcy and insolvency was authoritatively enunciated by the same tribunal (Cushing v. Dupuy, 5 App. Cas. 409; 49 L. J. P. C. 63; 1 Cart. 252), and the power of the provincial legislatures along the same line (now that we have no Dominion law upon this subject) has been frequently discussed. It is submitted that in the absence of legislation by the Dominion parliament, creative of any such legal relation as bankruptcy or insolvency, the provincial legislatures have full power (under section 92, sub-section 13—'property and civil rights in the province') to create such legal relations out of the facts of commercial life as to ensure, if deemed expedient, the equitable distribution of the estate of a man whose assets do not cover his liabilities, and to ensure also the discharge of the debtor from the balance of such liabilities. In the absence of legislation by the Dominion, no set of facts can constitute a legal relation to be known as bankruptcy or insolvency. By creating such a legal relation, to arise from such co-relation of facts as to the Dominion parliament might seem meet, the power of the provincial legislatures would be curtailed. Any attempt to state the *essential* elements of bankruptcy and insolvency legislation outside of a legislative definition of those terms, leaves one about as much in the dark as does Milton's description of Death."

[3] Tennant's Case, (1894) A. C. 31; 63 L. J. P. C. 25; 5 Cart. 244: see extract *ante*, p. 174; Fisheries Case, (1898) A. C. 700; 67 L. J. P. C. 90.

[4] "The *exception* from section 92 which is enacted by the concluding words of section 91."—Local Prohibition Case, (1896) A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295. See extract, *ante*, p. 177. And the concluding words of section 91 cover all 16 heads of section 92: *ib.*

[5] *Per* King, J., in *Re* Prohibition Liquor Laws, 24 S. C. R. at p. 258. "In relation to the subjects specified in section 92 of the B. N. A. Act, *and not falling within those set forth in section 91*, the exclusive power of the provincial legislatures may be said to be

(C) Dominion legislation is of two sorts:[6]

1. Upon matters falling within the 29 enumerated classes of section 91. Such legislation may

(*a*) Strictly relate to matters within those classes: in which case the jurisdiction of the parliament of Canada is exclusive, and provincial legislation is incompetent;[7] that the federal parliament has abstained from legislating thereon or has not legislated to the full limit of its powers is immaterial.[8]

(b) Be necessarily incidental to the due exercise of the powers conferred upon the federal parliament by the enumerative heads of section 91: in which case Dominion legislation may intrude upon the provincial field, overriding[9] repugnant provincial legislation which in the absence of such federal legislation would be operative.[10]

2. Under the opening, residuary, "peace, order, and good government" clause of section 91. Federal legislation in such case

absolute."—Brophy's Case, (1895) A. C. 202; 64 L. J. P. C. 70; 5 Cart. 156. See *post*, p. 189, where the question of "implied powers," "necessary powers," "plenary powers," or "powers by implication," is more fully discussed.

[6] Local Prohibition Case, (1896) A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295; see extract *ante*, p. 177.

[7] Fisheries Case, (1898) A. C. 700; 67 L. J. P. C. 90: see extract *ante*, p. 180; Union Colliery Co.'s Case, (1899) A. C. 580; 68 L. J. P. C. 118; see extract *ante*, p. 181.

[8] Union Colliery Co.'s Case, *ubi supra*.

[9] 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. 179.

[10] Local Prohibition Case, *ubi supra*.

(*a*) Is to be strictly confined to such matters as are unquestionably of Canadian interest and importance;[1] and

(*b*) Cannot trench upon the enumerated classes Nos. 1 to 15 (both inclusive) of section 92;[2] but

(*c*) It may, in a sense, encroach upon No. 16, and to the extent of such encroachment is of paramount authority.[3]

The "peace, order, and good government" clause of section 91 does not contain the word "exclusive;"[4] it is not guarded by a *non-obstante;* and to it "the exception from section 92, which is enacted by the concluding words of section 91 has no application." It is a purely residuary clause, and has operation subject always to the exclusive authority of the provincial legislatures over all matters falling within the enumerated classes of section 92.

(D) Subject as above, all matters which from a provincial point of view are of a local or private nature[5] are assigned to the provincial legislatures by section 92. That section enumerates 15 particular classes and concludes with a residuary or supplementary class, No. 16, which bears to the 15 enumerated classes the same relation as the opening residuary or supplementary clause of section 91 bears to the 29 classes particularly enumerated in that section.[6]

II. *Position of the Courts in reference to questions of legislative competence.*

In a country under the rule of law it necessarily devolves upon the courts to enquire and determine, in any given case,

[1] Local Prohibition Case, (1896) A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295; see extract *ante*, p. 177.

[2] *Ib.*

[3] *Ib;* Manitoba Liquor Act Case, (1902) A. C. 73; 71 L. J. P. C. 28. See note *ante*, p. 177, and p. 180.

[4] *Per* Strong, J., in the Dominion Liquor License Acts Case, Dom. Sess. Pap. 1885, No. 85 at p. 185; quoted by *Lefroy*, p. 711.

[5] In the opinion of the Privy Council this phrase properly describes all the subject matters committed to provincial authority by section 92: Local Prohibition Case, (1896) A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295; see extract *ante*, p. 176.

[6] *Ib.;* see extract *ante*, p. 179.

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.[7] "A statute emanating from a legislature not having power to pass it is not law."[8] It cannot confer rights or impose liabilities.[9] It is a *nullitas nullitatum*,[10] and can affect nobody.[1]

On the other hand, it is settled law that the powers of the Canadian legislatures, each in its sphere, are plenary powers of legislation.[2] But this is always "jurisdiction conceded;" and where jurisdiction depends upon a question of fact or a mixed question of law and fact the courts must determine this preliminary question. Under the B. N. A. Act two particular difficulties present themselves in this connection; (1) as to "necessarily incidental" or ancillary legislation by the federal parliament; (2) as to when a matter has "ceased to be merely local or provincial and has become matter of national concern" in such a sense as to bring it within federal jurisdiction.

[7] *Per* Meredith, C.J., in Valin v. Langlois, 5 Q. L. R. at p. 16; 1 Cart. at p. 231; *per* Duval, C.J., in L'Union St. Jacques v. Belisle, 20 L. C. Jur. at p. 39; 1 Cart. at p. 84: "The same law which has prescribed boundaries to the legislative power has imposed upon the judges the duty of seeing that that power is not exceeded." This proposition, seemingly self-evident, was elaborately attacked in argument in Marbury v. Madison, 1 Cranch. (U. S. Sup. Ct.) 137, and as elaborately affirmed in the classic judgment of Marshall, C.J., in that case. See also Brophy's Case, (1895) A. C. 202; 64 L. J. P. C. 70; 5 Cart. 156; Queen v. Burah, L. R. 3 App. Cas. 889; 3 Cart. 409; *ante*, p. 58.

[8] *Per* Meredith, C.J., in Valin v. Langlois, *ubi supra;* Brophy's Case, *ubi supra*.

[9] Theberge v. Landry, 2 App. Cas. 102, at p. 109; 46 L. J. P. C. 1; 2 Cart. 1, at p. 11.

[10] *Per* Taschereau, C.J., in Lenoir v. Ritchie, 3 S. C. R. at p. 625; 1 Cart. at p. 531.

[1] Bourgoin v. M. O. & O. Ry., 5 App. Cas. 381, at p. 406; 49 L. J. P. C. 68; 1 Cart. 233, at p. 249. It has been suggested that a person may be estopped from setting up the unconstitutionality of a statute: see *Lefroy*, 260, n. 1: but this cannot be so. Persons may be estopped by their own acts from denying liability, as, for instance, by entering into contracts which, though contemplated by invalid legislation, are valid apart from that legislation: but in any such case the statute, as a statute, must be treated as if it had never been passed: see *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.

[2] This question is discussed in Chap. IV., *ante*, p. 59, *et seq.*

Federal "Ancillary" [3] *Legislation:*

Dominion legislation upon the enumerated classes of section 91 may "occasionally and incidentally" involve legislation upon matters *primâ facie* within section 92. To meet such cases the concluding paragraph of section 91 was introduced. While that paragraph "was meant to include and correctly describes" all the 16 heads of section 92, it 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." [4] And the question is: Where is the line of necessity to be drawn and who is to draw it? [5]

[3] This is the word used in the Voluntary Assignments Case, (1894) A. C. 189; 63 L. J. P. C. 59; 5 Cart. 266—"ancillary provisions for the purpose of preventing the scheme of the Act from being defeated." See extract *ante*, p. 175. It is often difficult to draw a clear line of distinction between what is a "necessarily essential" part of an Act (see Cushing v. Dupuy, extract *ante*, p. 167), and "ancillary" or "necessarily incidental" provisions. Is the difference one of principle or of degree merely? The question is of importance in reference to provincial jurisdiction in the absence of federal legislation.

[4] Local Prohibition Case, (1896) A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295. See extract *ante*, p. 176.

[5] This was formerly much discussed as a question of "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; see *e.g.*, Leprohon v. Ottawa, 2 O. A. R. 522; 1 Cart 592. But in Lambe's Case (see extract *ante*, p. 172) the Privy Council strongly deprecated any attempt to reason from the powers of Congress to the powers of the parliament of Canada. 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." U. S. 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:" 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; *Lefroy*, 451, n 3. The B. N. A. Act confers power to make laws "in relation to" matters "coming within" certain classes; and the broad question in every

The question which, under the B. N. A. Act, the courts have to answer is "whether the one body or the other has power to make a given law."[6] If the validity of a federal enactment upon a matter *primâ facie* within provincial jurisdiction depends upon its being "necessarily incidental" to legislation upon matters clearly federal, it follows that the courts must determine the preliminary question.[7] The rule to be deduced from the cases seems to be this: that the widest discretion must be allowed to the federal parliament in the moulding of full-rounded legislation upon all matters assigned to it by the B. N. A. Act,[8] but that the courts have power to

case is whether the enactment in controversy is fairly "in relation to" a matter "coming within" a particular class. As to the line of enquiry to be adopted, see *post*, p. 193. In truth, as a distinct, independent rule of interpretation, this doctrine of "implied powers" is scarcely applicable to a federal system such as ours. It is really nothing more than a short form of expression embodying the doctrine of the supremacy of the legislature in relation to those matters which, upon a reasonable and proper interpretation, can fairly be said to fall within one of the classes of subjects committed to such legislature; but, as will be at once perceived, this still leaves the question open for the application of those other rules—rules of interpretation proper—applicable for the reconciliation of apparently conflicting classes of ss. 91 and 92. Legislative jurisdiction must first be conceded before the doctrine of "implied powers" can apply. A reference to the various cases in which this doctrine has been applied in terms will disclose that as a preliminary to its application, jurisdiction over the subject matter in dispute was affirmed. It is noteworthy that the Privy Council has never used the phrase "implied powers," preferring the other form—"plenary powers." Cushing v. Dupuy (5 App. Cas. 409; 49 L. J. P. C. 63; 1 Cart. 252), in reference to the scope of "bankruptcy and insolvency" legislation, is frequently referred to as illustrative of the application of this doctrine of "implied powers," but a perusal of the judgment of the committee in that case discloses that no such doctrine is referred to, the point decided being that procedure is an essential part of insolvency legislation—a decision as to the scope of certain words in the B. N. A. Act, not as to the nature of the legislative power of the Dominion parliament.

[6] Lambe's Case, extract *ante*, p. 173.

[7] The cases as to railway legislation (see *post*, p. 208 *et seq.*), are perhaps the most noteworthy in this connection.

[8] Tenant v. Union Bank (banking laws), 1894. A. C. 31; 63 L. J. P. C. 25; 5 Cart. 244; 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; 3 Cart. 297; *Re* C. P. R. & York, 27 O. R. 559; 25 O. A. R. 65; *In re* De Veber, 21 N. B. 425; 2 Cart. 556; Phair v. Venning, 22 N. B. 371; Atty.-Gen. v. Foster, 31 N. B. 164.

prevent and will prevent usurpation under the guise of colorable ancillary legislation.[9]

On the other hand the powers of a provincial legislature are not protected by any *non-obstante* clause or by any clause like that with which section 91 concludes.[10] In an early case relating to a provincial enactment, Dorion, C.J., laid down as "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 B. N. A. Act declared should be carried out by that legislature."[1] In view of subsequent discussion the true position would seem 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."[2]

Matters of National Concern:

As the jurisdiction of the federal parliament under the "peace, order, and good government" clause of section 91

[9] Legislative bodies are proverbially impatient of constitutional limitations upon their power. 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, complaint is made of practical usurpation. In all other cases the courts must restrain colorable encroachment. The Privy Council has intimated the possible exercise of this restraining power: see Russell v. Reg., 7 App. Cas. 829; 51 L. J. P. C. 77; 2 Cart. 12; Brewers' License Case, (1897) A. C. 231; 66 L. J. P. C. 34; Atty.-Gen. (Que.) v. Queen Ins. Co., 3 App. Cas. 1090; 1 Cart. 117; Man. Liquor Act Case, (1902) A. C. 73; 71 L. J. P. C. 28.

[10] See *ante*, p. 185.

[1] Bennett v. Pharm. Assn. of Quebec, 1 Dor. 336; 2 Cart. 250.

[2] *Per* King, J., in *Re* Prohibitory Liquor Laws, 24 S. C. R. at p. 258. The possibly prejudicial effect which valid provincial legislation may have upon subjects within the sphere of federal legislative power is referred to *post*, p. 198-9.

is to be "strictly confined to such matters as are unquestionably of Canadian interest and importance,"[3] the courts must accept the responsibility of deciding this question of fact.[4]

Repugnancy:

Where federal legislation is alleged to conflict with, and so to override, provincial legislation this question of inconsistency or repugnancy is to be determined by the courts.[5]

(a) The Method of Enquiry:

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.[6] 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 Parson's Case,[7] still stands good: that the first question in reference to any impugned Act is whether it deals with a matter *primâ facie* within section 92. If it does not, no further question remains; if the legislation be federal it is valid, if provincial it is *ultra vires*.

[3] Local Prohibition Case, extract *ante*, p. 177.

[4] See note 8 *ante*, p. 178. In the Local Prohibition Case, (1896) A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295, their Lordships of the Privy Council speak of being relieved of this responsibility in the case of the Canada Temperance Act by the previous decision of the Board in Russell v. Reg., 7 App. Cas. 829; 51 L. J. P. C. 77; 2 Cart. 12. In deciding such a question, is judicial notice to be taken of the conditions, political, social, and industrial, of the Dominion?

The Manitoba Liquor Act Case, (1902) A. C. 73; 71 L. J. P. C. 28, however, shows that a provincial legislature may deal with a matter in its provincial or local aspect even when it has a larger national aspect sufficient to justify federal legislation. Where such federal legislation exists, repugnant provincial legislation must remain in abeyance; Local Prohibition Case, extract *ante*, p. 179.

The *onus* of showing that a matter in itself local or provincial has become of national interest and magnitude is upon those who assert the fact: see notes to No. 16 of section 92, *post*.

[5] Local Prohibition Case, extract *ante*, p. 179. As to the question of repugnancy between imperial and colonial legislation: see *ante*, p. 27, *et seq.*

[6] See the rules of interpretation discussed *post*, p. 196 *et seq.*

[7] See extract *ante*, p. 169.

If the legislation be *primâ facie* within section 92, "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."[8]

But "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;"[9] and, therefore, at the threshold of every case[10] this test question of aspect[1] 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:

In order to ascertain the class to which a particular enactment really belongs, the primary matter dealt with by it,[2] *its subject matter and legislative character,*[3] *the true nature and character of the legislation,*[4] *its pith and substance,*[5] *must be determined.*

If, upon such consideration, a provincial enactment be found to fall within a federal class it will be held void;[6] and if, upon like considerations, a federal enactment be found to fall within a provincial class it will be denied operation[7] un-

[8] *Ib.*

[9] Hodge's Case, extract *ante*, p. 172.

[10] *Per* Osler, J.A., in Reg. v. Wason, 17 O. A. R. 221; 4 Cart. 578.

[1] There has been discussion as to whether this word is to be understood subjectively or objectively: see *Lefroy*, 394. *Cui bono?*

[2] Russell v. Reg., 7 App. Cas. 829; 51 L. J. P. C. 77; 2 Cart. 12.

[3] Hodge v. Reg., 9 App. Cas. 117; 53 L. J. P. C. 1; 3 Cart. 144.

[4] Russell v. Reg., *ubi supra.*

[5] Union Colliery Co. v. Bryden, (1899) A. C. 580; 68 L. J. P. C. 118.

[6] See *ante*, p. 186. Upon such considerations provincial enactments have been held void by the Privy Council in Atty.-Gen. (Que.) v. Queen Ins. Co., 3 App. Cas. 1090; 1 Cart. 117: Atty.-Gen. (Que.) v. Reed, 10 App. Cas. 141; 54 L. J. P. C. 12; 3 Cart. 190; Union Colliery Co. v. Bryden, *ubi supra*: Madden v. Nelson and F. S. Ry., (1899) A. C. 626; 68 L. J. P. C. 148; *Re* Lord's Day Acts (July 1903).

[7] As in the Dominion License Acts Case, 4 Cart. 342, n. 2 (see also Ont. Sess. Pap., 1885, No. 32; Dom. Sess. Pap., 1885, No. 85; Cassels' Sup. Ct. Dig. 509), and in the Fisheries Case, (1898) A. C. 700; 67 L. J. P. C. 90.

less it is part of, and necessarily incidental to, federal legislation upon matters clearly federal.[8]

In reaching a conclusion as to how a given enactment is to be constitutionally classified the courts will, if necessary, disregard title and preamble [9] or misused words.[10]

An Act may be ULTRA VIRES *in part only.* The question in such case is whether the good and the bad are separable, so that each may be taken to be a distinct declaration of the legislative will. In such case the good will stand;[1] but if the invalid clause or clauses are a necessary part of the scheme of the

[8] See *ante*, p. 186.

[9] See Fredericton v. Reg., 3 S. C. R. 505; 2 Cart. 1: Reg. v. Wason, 17 O. A. R. at p. 223.

[10] Atty.-Gen. (Que.) v. Queen Ins. Co., *ubi supra;* 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.

To attempt here an exhaustive statement of the various cases in which the main proposition stated in the text has been discussed and applied would be to duplicate much of what must appear in the notes to the various classes of secs. 91 and 92. The following cases, in addition to those already cited, are noteworthy.—Reg. v. Stone. 23 O. R. 46 (to be read with Reg. v. Wason and the Lord's Day Case, both *ubi supra*; *Re* Tomey Homma, (1903) A. C. 151; 72 L. J. P. C. 23 (to be read with Union Colliery Co. v. Bryden, *ubi. supra*) ; C. P. R. v. N. D. de Bonsecours, (1899) A. C. 367; 68 L. J. P. C. 54 (to be read with Madden v. Nelson and F. S. Ry., *ubi supra*:) Voluntary Assignments Case, (1894) A. C. 189; 63 L. J. P. C. 59; 5 Cart. 244 (to be read with Cushing v. Dupuy, 5 App. Cas. 409; 49 L. J. P. C. 63; 1 Cart. 252; and L'Union St. Jacques v. Belisle, L. R. 6 P. C. 31; 1 Cart. 63). Striking instances of the possible differences of opinion are Quirt v. Reg., 19 S. C. R. 510 (see notes to No. 15 of sec. 91, *post*), and Peak v. Shields, 8 S. C. R. 579 (see notes to No. 21 of sec. 91, *post.*)

As to colorable legislation, see Atty.-Gen. (Que.) v. Queen Ins. Co., *ubi supra*; Brewers' License Case, (1897) A. C. 231; 66 L. J. P. C. 34; Manitoba Liquor Act Case, (1902) A. C. 73; 71 L. J. P. C. 28; see *ante*, p. 191.

[1] Fisheries Case, (1898) A. C. 700; 67 L. J. P. C. 90: Blouin v. Quebec, 7 Que. L. R. 18; 2 Cart. 368; 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; 2 Cart. 445; Reg. v. McMillan, 2 Pugs. 112; 2 Cart. 491: *Cooley* on Const. Limitations, 6th ed., 209, *et seq.* See also Fielding v. Thomas, (1896) A. C. 600; 65 L. J. P. C. 103; 5 Cart. 398.

Act the whole Act must fall.[2] 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.[3]

It has been said that an enactment may be *intra vires* in some of its applications while *ultra vires* in others.[4] 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."[5]

In numerous subsequent cases the principle has been invoked in reference to both federal and provincial Acts.[6] One of the latest expressions of the rule is that "in cases of doubt every possible presumption and intendment will be made in favor of the constitutionality of the Act."[7] It does not apply

[2] *Per* Ramsay, J., in Dobie v. Temp. Board, 3 Leg. News, at p. 251; 1 Cart. at p. 384; Clarkson v. Ont. Bank, 15 O. R. 179, 189, 193; 4 Cart. 514, 525, 531.

[3] *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.

A provincial Act cannot be partially disallowed by the Governor-General. "He disallows the Act as a whole, and could not disallow a section."—*per* Lord Chan. Herschell during the argument in Brophy's Case: see *Lefroy*, 289, n. 1.

[4] See *Lefroy*, 292, *et seq.*

[5] Valin v. Langlois, 5 App. Cas. 115; 49 L. J. P. C. 37; 1 Cart. 158.

[6] See cases as to the application of provincial Acts to federal railways, noted *post*, p. 272 *et seq.* See also Allen v. Hanson, 18 S. C. R. 667; 4 Cart. 470; 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.

[7] Reg. v. Wason, 17 O. A. R. at p. 235—*per* Burton, J.A.

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.[8]

(*b*) *Certain rules of interpretation:*

Although the Privy Council has affirmed that courts of law must treat the provisions of the B. N. A. Act "by the same methods of construction and exposition which they apply to other statutes,"[9] the judgments of that tribunal do lay down certain rules of interpretation to be applied in reconciling sections 91 and 92 which, if not exclusively applicable to the B. N. A. Act, are peculiarly to be borne in mind in interpreting its meaning.[10]

In order to determine the meaning of the terms employed in describing any particular class, other parts of the B. N. A. Act and of other imperial Acts in pari materia may be looked at.[1]

Examples of the application of this rule:

The meaning of the words "the regulation of trade and commerce" (No. 2 of section 91) was to a certain extent determined by the meaning given to a somewhat similar phrase in the Act of Union between England and Scotland.[2] That a

[8] No stronger instance of restrictive interpretation to save jurisdiction could be cited than McLeod v. Atty.-Gen. N. S. W., (1891) A. C. 455; 60 L. J. P. C. 55. See also: as to the operative force of Imperial Acts beyond the United Kingdom, the cases cited *ante*, p. 62 *et seq.*

[9] Lambe's Case, 12 App. Cas. 575; 56 L. J. P. C. 87; 4 Cart. 7.

[10] Some of these rules have been already referred to in the notes to the preamble of the B. N. A. Act, *ante*, p. 69 *et seq.*

[1] Parsons' Case, 7 App. Cas. 96; 51 L. J. P. C. 11; 1 Cart. 265. See notes to the preamble of the Act, *ante*, p. 70.

[2] *Ib.* See the passage quoted in the notes to sec. 91, No. 2, *post*. In an opinion by the law officers of the Crown in England (see Dom. Sess. Pap. 1877, No. 89) as to the scope of the class "the solemnization of marriage in the province," No. 12 of sec. 92, the same meaning is attributed to those words as they had been held to bear in an English statute: see notes to No. 26 of sec. 91, "marriage and divorce," *post*, p. 234.

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 minds 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, etc., which enumeration would have been meaningless if the larger scope had been intended for No. 2.

In the same case [3] the meaning of the phrase "property and civil rights" (No. 13 of section 92) was elucidated by reference to the same phrase in section 94 of the B. N. A. Act and in section 8 of the Quebec Act, 1774.[4]

The scope of the class "interest" (No. 19 of section 91) 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.

The sections must be read together and the language of the one interpreted and, where necessary, modified by that of the other.[6]

Very few cases arise which do not call for the application of this rule; and to multiply examples here would serve no

[3] Parsons' Case, *ubi supra*.

[4] It also occurs in the Upper Canadian Statute introducing English law into that province, and there has clearly a most extended meaning. It was evidently copied from the Quebec Act. See *ante*, pp. 47 *et seq*. From this very comprehensive class there must, however, be abstracted the classes contained in section 91, which relate to particular branches of the law of property and civil rights. See the next rule. The reconciliation of one class of sec. 91 with other classes of that same section seems to fall more properly within the rule now under discussion, although, perhaps, of little importance in itself. The next rule is, strictly speaking, only a branch of this, but the necessity for reconciling the classes of 92 with those of 91 is so imperative that separate treatment is advisable.

[5] Lynch v. Can. N. W. Land Co., 19 S. C. R. 204; see notes to sec. 91, No. 19.

[6] Parsons' Case, extract *ante*, p. 169.

good purpose.[7] One marked result has been to establish a general sub-rule that *from any large general class in either section must be excepted any particular class in the other which forms a branch or sub-division of the larger general class.*[8]

For example: From the general class "criminal law" (No. 27 of section 91) must be excepted the particular class, provincial penal law (No. 15 of section 92).[9]

From "the regulation of trade and commerce" (No. 2 of section 91) must be excepted trade "licenses" (No. 9 of section 92).[10]

From "property and civil rights" (No. 13 of section 92) must be excepted many items of section 91.[1]

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.[2]

It has, indeed, been suggested that all the items of section 92 are in the nature of exceptions to section 91;[3] 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.[4]

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 possibility it may be abused or

[7] Some examples are given in the judgment from which the rule is taken.

[8] Parsons' Case, extract *ante*, p. 168. Some examples are there given.

[9] Reg. v. Boardman, 30 U. C. R. at p. 556; 1 Cart. at p. 679. And see the notes to the classes mentioned in the text, *post*.

[10] Fredericton v. Reg., 3 S. C. R. at p. 551; 2 Cart. at p. 47.

[1] See the notes to No. 13 of sec. 92, *post*. In the Quebec Resolutions, 43 (15), the exception is expressly made.

[2] See the notes to Nos. 14 and 15 of sec. 92, *post*.

[3] Reg. v. Severn, 2 S. C. R. 106, 110; 1 Cart. 450, 454; Thrasher Case, 1 B. C. (pt. 1) 170.

[4] See *per* Burton, J.A., in Hodge v. Reg., 7 O. A. R. at p. 274; 3 Cart. at p. 179.

extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

1. The public debt and property. (*a*)

---

may limit the range which otherwise would be open to the other legislature.[5]

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.[6] Provincial legislatures may pass Mortmain Acts and thus prevent federal corporations from carrying on the business for which they are incorporated.[7] Dominion excise laws may be rendered nugatory by provincial prohibition.[8] A province may sell its timber on terms prohibiting export.[9] Fisheries regulations may prejudically affect the owners of fishing grounds, provincial or private.[10] 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.[1] As has been said, lawful legislation does not become unlawful because it cannot be separated from its inevitable consequences.[2]

(*a*) This has reference, of course, to the public debt of the Dominion, as a unit, assumed upon Confederation or since incurred, and to the public property held by the Dominion government in trust for Canada as a whole.[3]

[5] Lambe's Case, extract *ante*, p. 173. There is some discussion of this rule in the note on p. 183 *ante*.

[6] 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.

[7] Parsons' Case, 7 App. Cas. 96; 51 L. J. P. C. 11; 1 Cart. 265. See notes to No. 11 of sec. 92, *post*.

[8] Man. Liquor Act Case, (1902) A. C. 73; 71 L. J. P. C. 28.

[9] Smylie v. Reg., 27 O. A. R. 172.

[10] Fisheries Case, (1898) A. C. 700; 67 L. J. P. C. 90.

[1] See notes to No. 10 of sec. 92, *post*.

[2] *Per* Wilson, C.J., in Reg. v. Taylor, 36 U. C. Q. B. 206.

[3] See ss. 102, *et seq.*, *post*.

2. The regulation of trade and commerce. (*b*)

(*b*) In what may be termed the leading case[2] upon this class, its scope is thus discussed:

"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

[2] Parsons' Case, (1881), 7 App. Cas. 96; 51 L. J. P. C. 11; 1 Cart. 265, in which the Act (Ont.), respecting uniform conditions in fire insurance policies was attacked as being a regulation of trade.

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.[3] So with regard to Acts relating to bankruptcy, and various other matters.

"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

[3] This would seem to indicate that such Acts are not a "regulation of trade and commerce." Nevertheless in Russell v. Reg. (7 App. Cas. 829; 51 L. J. P. C. 77; 2 Cart. 12), involving the validity of the Canada Temperance Act, 1878, Sir Montague E. Smith, in delivering 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; 5 Cart. 295; 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 and regulate is founded on No. 9 of s. 92; Hodge's Case, 9 App. Cas. 117; 53 L. J. P. C. 1; 3 Cart. 144, as explained in the Local Prohibition Case, *ubi supra*.

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."[4]

In a later case[5] it was urged that the power of the Dominion parliament to regulate trade and commerce operates to prevent a provincial legislature from levying taxes 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*,[6] 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,[7] 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

[4] In the Local Prohibition Case, (1896) A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295, the following passage occurs: "The scope and effect of No. 2 of s. 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. See the further passage from Parsons' Case, quoted *ante*, pp. 170-1.

[5] Lambe's Case, 12 App. Cas. 575; 56 L. J. P. C. 87; 4 Cart. 7.

[6] 2 S. C. R. 70; finally overruled by the Brewers' License Case (1897) A. C. 231; 66 L. J. P. C. 34.

[7] *Ubi supra.*

Parsons' Case, they would be straining them to their widest possible extent." [8]

It is somewhat curious 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 has the attack been successful. In the absence of any general [9] 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 with this class No. 2 of section 91; [10] 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*; [1] and this decision

[8] No further attempt to define the precise scope of this class has been made by the Privy Council. There are numerous expressions of opinion upon the subject in the Canadian cases, but, as Mr. Lefroy says, "the precise determination of its scope can scarcely be said to have been much advanced." See his "Leg. Power in Can.," 555, where in a note are collected a number of *dicta* of individual judges. These to a large extent are but paraphrases of the language used in the Parsons' Case. As to the incorporation of Boards of Trade and Chambers of Commerce, see reports of Ministers of Justice noted in Lefroy, 561 (*n*).

[9] "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*).

[10] Hodge's Case, Local Prohibition Case, Manitoba Liquor Act Case; see note *ante*, p. 201.

[1] Re Harris v. Hamilton, 44 L. 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 the notes to that class *post*.

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 markets of a municipality, was held valid;[2] and a provincial legislature may authorize municipal bodies to pass by-laws in restraint of nuisances hurtful to public health.[3]

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.[4]

A license tax on merchants, wholesale or retail, may be imposed by provincial legislation.[5]

A provincial Act may regulate the width of tires to be used upon particular streets.[5a]

Provincial health regulations are *intra vires* as affecting the shipping trade and ships engaged in it.[5b]

Provincial game laws may go so far as to prohibit exportation.[6]

[2] Angers v. Montreal, 24 L. C. Jur. 259; 2 Cart. 335; Mallette v. Montreal, *ib.*, 263, 340; Montreal v. Riendeau, 31 L. C. Jur. 129, (1887); Pigeon v. Recorders' Court, 17 S. C. R. 495; 4 Cart. 442.

[3] *Ex p.* Pillow, 27 L. C. Jur. 216; 3 Cart. 357; 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.

[4] 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).

[5] Weiler v. Richards, 26 Can. L. Jour. 338, *per* Begbie, C.J., (B.C.): McManamy v. Sherbrooke, Mont. L. R. 6 Q. B. 409. There is no constitutional distinction between wholesale and retail trade; 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; 5 Cart. 295; Man. Liquor Act Case, (1902), A. C. 73; 71 L. J. P. C. 28.

[5a] Reg. v. Howe, 2 B. C. 36.

[5b] C. P. N. Co. v. Vancouver, 2 B. C. 193.

[6] Reg. v. Boscowitz, 4 B. C. 132; Reg. v. Robertson, 13 Man. L. R. 613.

A province may tax insurance agents,[7] foreign insurance companies.[8] commercial travellers,[9] or laundries.[10]

The provisions of the Ontario Mercantile Amendment Act, as to the rights and liabilities of consignees and indorsees of bills-of-lading, were held [1] 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. No doubt such Acts in a sense affect trade and commerce, but they have primary reference to the civil rights of employers and employees [2]—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.

The fact that provincial legislation may prejudicially affect trade and commerce does not operate to prevent the full

[7] English v. O'Neill, 4 Terr. L. R. 74.

[8] Halifax v. Western Ass'ce Co., 18 N. S. 387; Halifax v. Jones, 28 N. S. 452.

[9] Poole v. Victoria, 2 B. C. 271. See also Three Rivers v. Major, 8 O. L. R. 181.

[10] Reg. v. Mee Wah, 3 B. C. 403; Lee v. Montigny, 15 Que. S. C. 607. The question as to provincial powers of taxation is more fully discussed in the notes to No. 2 of s. 92, *post*. See also the B. C. cases as to the virtual exclusion of Chinese from particular trades by excessive license fees: notes to No. 25 of s. 91, *post*.

[1] Beard v. Steele, 34 U. C. Q. B. 43; 1 Cart. 683. The reasons for upholding these provisions is more fully stated in Reg. 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; 5 Cart. 244. See also Smith v. Merchants Bank, 8 S. C. R. 512; 1 Cart. 829.

[2] 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 and the authorities are collected in the notes to No. 10 of s. 92, *post*.

3. The raising of money by any mode or system of taxation. (*c*)

4. The borrowing of money on the public credit. (*c*)

---

exercise of the powers conferred upon provincial legislatures by section 92.[3]

(*c*) No. 2 of section 92 assigns to provincial legislatures the exclusive power to make laws relating to "direct taxation within the province." The Privy Council commenting upon this provincial power remark that the above item No. 3

"... certainly is in literal conflict with it. It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time to give to the provincial legislature, exclusively or at all, the power of direct taxation for provincial or any other purpose. This very conflict between the two sections was noticed by way of illustration in the case of Parsons. Their Lordships there said, '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 power.' Their Lordships adhere to that view, and hold that as regards direct taxation within the province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the provincial legislatures."[4]

Mutatis mutandis, the views expressed in the above extract apply to a comparison of No. 4 of section 91 with No.

[3] This general rule is discussed *ante*, p. 198, *et seq.* One of the latest instances of its application is Smylie v. Reg., 31 O. R. 202, 27 O. A. R. 172, in which Ontario was held entitled (under No. 5 of s. 92) to impose such conditions as it might see fit as to the export of timber by Crown licensees. The latest pronouncement by the Privy Council is in the Man. Liquor Act Case, (1902) A. C. 73; 71 L. J. P. C. 28.

[4] Lambe's Case, 12 App. Cas. 575; 56 L. J. P. C. 87; 4 Cart. 7.

5. Postal service.

6. The census and statistics. (*d*)

---

3 of section 92, "the borrowing of money on the sole credit of the province."

This further view deserves consideration, namely, that these apparently overlapping powers do not in fact conflict at all. The power of either government in this connection is limited to raising money for purposes connected with its sphere of authority; the choice of method allowed to the Dominion government being of the widest possible character while the provincial governments are limited to direct taxation within the province, because, as it is put in this very case, the power of indirect taxation would be felt all over the Dominion. Perhaps this should not be advanced as a further view; it probably represents what was in the mind of the committee in using the expression "obviously." In a later case [5] the Privy Council has pointed out that 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, adding that the difficulties arising from such taxation "of the same subject matter and within the same area by different authorities" would no doubt be "obviated in practice by the good sense of the legislatures concerned."

That these powers of taxation may possibly be abused is no argument against the existence of the power.[6]

(*d*) 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 B. N. A. Act, and to the compilation of statistics in reference to

[5] Fisheries Case, (1898) A. C. 700; 67 L. J. P. C. 90.

[6] See the general rule discussed *ante*, p. 198, *et seq.*

nationality and creed, the increase or decrease of population, and kindred matters. In the Quebec Resolutions[7] 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.

(*e*) 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. The Commander-in-Chief of the Canadian forces is appointed by the Imperial authorities.[8] At the same time, the laws relating to the volunteer forces of Canada are largely of Canadian enactment, though carefully scrutinized by the Imperial authorities. In the only case upon this class since confederation[9] it was held (in Quebec) that the provisions of the Imperial "Army Act, 1881," do not apply to Canada so as to make persons not connected with the active militia of the Dominion liable in respect of acts which are offences under the Imperial Act but not under the Militia Act of Canada. Apparently, Mr. Justice Chauveau held the view that the legislative authority of the Dominion parliament under this sub-section is "exclusive" as between that parliament and the parliament of the United Kingdom—a view which cannot of course be maintained.[10] He treats the English Army Act of 1881 as applicable in

[7] See Appendix.

[8] B. N. A. Act, s. 15, *ante*, p. 103.

[9] Holmes v. Temple, 8 Q. L. R. 351; 2 Cart. 396. See Reg. v. Schram, 14 U. C. C. P. 318 (1864), noted *ante*, p. 37.

[10] See *ante*, p. 37.

8. The fixing of and providing for the salaries and allowances of civil and other officers of the government of Canada. (*f*)

Canada only to the extent to which it is expressly made so by the Canadian Militia Act. The proper 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[1]—that is to say, in so far as Canadian legislation is supplementary to and not inconsistent with Imperial legislation upon the subject, this item No. 7 distinctly affirms the authority of the Dominion parliament, as distinguished from provincial assemblies, to pass such legislation.

(*f*) This item is silent as to the appointment of federal officers.[2] In so far as Dominion legislation makes no express provision as to the mode of appointment to a federal office, such appointment should be made by the Governor-General on the advice of his ministers.[3]

Provincial powers of taxation do not extend over the salaries of the executive staff of the Dominion.[4] The decisions are based not so much upon the limited range of No. 2 of section 92, "direct taxation within the province," as upon the broader grounds of public policy that a provincial legislature has no power to impose a burden upon the instruments by which the government of the Dominion is carried

[1] See *ante*, pp. 25, 27.

[2] In this respect differing from the corresponding item (No. 4) of s. 92.

[3] See notes to s. 9, *ante*, p. 89, *et seq.*

[4] Leprohon v. Ottawa, 2 O. A. R. 522; 1 Cart. 592. (reversing 40 U. C. Q. B. 490, where will be found strong arguments in support of the contrary view); Reg. 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*.

9. Beacons, buoys, lighthouses, and Sable Island.
10. Navigation and shipping. (*g*)

---

on.[5] Upon the same principle it has been held that Dominion officials cannot be ordered to pay a judgment by instalments under provincial Acts,[5a] and that their salaries cannot be attached or made exigible in execution under such Acts.[5b]

(*g*) This is one of those subjects as to which colonial legislative power is limited by reason of the existence of Imperial legislation upon the subject applicable to, and in force in, the different colonies of the Empire.[6] It is of course beyond the scope of this work to attempt any treatment of this large branch of English jurisprudence; the enquiry is simply as to the line of division between the Dominion parliament and the provincial legislature in respect of the various matters which may appear in some aspects to fall within this class, and, in other aspects, within some one or more of the various classes of section 92.

The line of argument which led the Privy Council[7] to limit "the regulation of trade and commerce" to regulations relating to general trade and commerce, would appear to be equally applicable to limit this class. Nos. 9, 11, and 13 would be unnecessary if the wider meaning were intended to be given to it.[8]

A provincial legislature cannot authorize such an obstruction of a navigable stream as would create a public nuisance.[9]

[5] Following U. S. authorities; see note, *ante*, p. 199. Whether these decisions can stand in face of Lambe's Case (12 App. Cas. 575; 56 L. J. P. C. 87; 4 Cart. 7) 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.

[5a] *Ex p.* Killam, 34 N. B. 586.

[5b] Evans v. Hudon, 22 L. C. Jur. 268; 2 Cart. 346.

[6] See *ante*, p. 25 *et seq.*

[7] In Parsons' Case. See the passage quoted *ante*, p. 200.

[8] See also No. 10 of s. 92; also s. 108.

[9] Re Brandon Bridge (1884), 2 Man. L. R. 14; Queddy River Boom Co. v. Davidson, 10 S. C. R. 222. In that case there was no

But 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.[10] A provincial legislature, for example, may extend the boundaries of a municipality so as to include therein part of a navigable river.[1]

"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.[2]

Dominion legislation upon the subject to alter the law as it existed in New Brunswick at the date of the Union, and the true effect of the decision would seem to be contained in an observation of Mr. Justice Strong: "The Queddy river is shown 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 shows to be especially injurious to him 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 show some legal justification for the interference with the navigation of the river caused by the construction and maintenance of these booms; they, however, show nothing but an Act of the provincial legislature." To the same effect: Reg. v. Fisher, (1891) 2 Ex. Ct. R. 365. 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 Gov.-Gen'l. of Canada, not by the Lieut.-Gov. of a province: *ib.* And where the Crown had allowed a bridge to be built before Confederation which obstructed navigation, the Dominion government was held bound: Reg. v. Moss, 26 S. C. R. 322. The Atty. Gen of Canada may take proceedings to restrain by injunction the pollution of navigable waters and, *semble*, a provincial Atty-Gen. may also take action to restrain such a nuisance: Atty.-Gen. Can. v. Ewen, 3 B. C. 468.

[10] MacMillan v. The S. W. Boom Co., 1 Pug. & Burb. 715; 2 Cart. 542.

[1] Central Vermont Ry. Co. v. St. John, 14 S. C. R. 288; 4 Cart. 326.

[2] *Per* Fournier, J., at p. 297.

A provincial Act may incorporate a navigation or transportation company the operations of which are limited to the province.[3]

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.[4]

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 general regulations imposed by Dominion legislation respecting navigation and shipping within the scope of this No. 10 of section 91.[5]

Provincial powers of taxation may be exercised upon the shipping trade,[6] and navigation companies must observe the provisions of provincial health laws within the province.[7]

The Dominion parliament may create Maritime Courts having jurisdiction over matters falling within this class,[8] or may confer such jurisdiction upon other courts, *e.g.*, upon Vice-Admiralty Courts existing in Canada under Imperial Acts.[9] In this last case, of course, nothing repugnant to such Imperial Acts would be valid.[10]

[3] McDougall v. Union Nav. Co., 21 L. C. Jur. 63; 2 Cart. 228; *Re* Lake Winnipeg Transportation Co., 7 Man. L. R. 255.

[4] Normand v. St. Lawrence Nav. Co., 5 Q. L. R. 215; 2 Cart. 231. See also Fisheries Case, (1898) A. C. 700; 67 L. J. P. C. 90; Reg. 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; and notes to s. 108, *post*, as to provincial ownership of Crown lands upon the shores of rivers, lakes, etc.

[5] See Dinner v. Humberstone, 26 S. C. R. 252.

[6] 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; 4 Cart. 7. See *ante*, p. 199, where the general rule is discussed; and the notes to No. 2 of s. 92, *post*.

[7] C. P. Nav. Co. v. Vancouver, 2 B. C. 193.

[8] The Picton, 4 S. C. R. 648; see notes to No. 14 of s. 92, *post*.

[9] The Farewell, 7 O. L. R. 380; 2 Cart. 378.

[10] See Chap. III., *ante;* Todd, "Parl. Gov. in Brit. Col.," p. 149 *et seq.*

11. Quarantine and the establishment and maintenance of marine hospitals.

12. Sea coast and inland fisheries. (*h*)

(*h*) The scope of this class is thus discussed by the Privy Council:[1]

"Their Lordships are of opinion that the 91st section of the B. N. A. 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[2] 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."

* * * * * * * *

"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 legisla-

[1] Fisheries Case, (1898) A. C. 700; 67 L. J. P. C. 90.

[2] 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.

tive 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 Dominion 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[3] . . . 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,[4] 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. So, too, the terms and conditions upon which the fisheries which are the property of the province may be granted, leased, or otherwise

[3] See the general rule *ante*, p. 186. The passage here omitted will be found *ante*, p. 180.

[4] The examples 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. 193.

disposed 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."

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[5] 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 in quo* 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.[6] It was held that the scope of this class No. 12 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;"

[5] Terminating in Reg. v. Robertson, 6 S. C. R. 52.

[6] The Fisheries Case, *ubi supra*, affirms this holding. The judgment of the Supreme Court in the Fisheries Case (22 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).

13. Ferries between a province and any British or foreign country, or between two provinces. (*i*)
14. Currency and coinage.
15. Banking, incorporation of banks, and the issue of paper money. (*j*)

—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 those rights. Such legislation would be confiscation, not regulation.[7]

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."[8]

(*i*) In a recent case,[9] Mr. Justice Street has held that the prerogative right of the Crown to grant ferry rights is a "royalty," within the meaning of section 109 of the B. N. A. Act, which remained with the provinces; that the legislative jurisdiction conferred by this class, No. 13 of section 91, does not authorize the grant by the Dominion government of a license to operate a ferry between a Canadian and a foreign port;[10] that such a license can be granted only by the provincial executive.

(*j*) "The legislative authority conferred by these words is not confined to the mere constitution of corporate bodies with

[7] The judgment of the P. C. in the Fisheries Case substantially affirms the above. *Quære*, perhaps, as to "laws with reference to the improvement and the increase of the fisheries." The fisheries are provincial assets.

[8] Re Lake Winnipeg Trans. Co., 7 Man. L. R. 255.

[9] Perry v. Clergue, 5 O. L. R. 357. The subject of this class will come up for fuller discussion under the exceptions from No. 10 of s. 92, "Local Works and Undertakings, except, etc.," *post*.

[10] Following the Fisheries Case and others, noted *ante*, p. 163.

16. Savings banks.

17. Weights and measures.

18. Bills of exchange and promissory notes.

---

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."[1]

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.[2]

Provincial power to tax banks is now authoritatively established.[3]

The difference of view which is possible as to the classification of a given enactment is exhibited in a case[4] arising out of the winding-up of the defunct Bank of Upper Canada. The Court of 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.

[1] Tennant v. Union Bank, (1894) A. C. 31; 63 L. J. P. C. 25; 5 Cart. 244.

[2] Merchants Bank v. Smith, 8 S. C. R. 512; 1 Cart. 828; Tennant v. Union Bank, (1894) A. C. 31; 63 L. J. P. C. 25; 5 Cart. 244. The particular provision in question in these cases has since been repealed, so that fuller scope is allowed for the operation of provincial legislation: see Beard v. Steele, 34 U. C. Q. B. 43, referred to *ante*, p. 205.

[3] Lambe's Case, 12 App. Cas. 575; 56 L. J. P. C. 87; 4 Cart. 7; Windsor v. Commercial Bank, 3 Russ. & Geld. 420; 3 Cart. 377. See *ante*, p. 198, where the general rule is discussed; and the notes to No. 2 of s. 92, *post*.

[4] Quirt v. Reg., 19 S. C. R. 510; (*sub nom.* Reg. v. Wellington) 17 O. A. R. 421; see *ante*, pp. 193-4.

19. Interest. (*k*)

20. Legal tender.

(*k*) Provincial legislation imposing an additional percentage upon over-due taxes does not fall within this class.[5]

"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."[6]

* * * * * * * *

"Does not the collocation of No. 19 with the 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 shows."

* * * * * * * *

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

[5] Lynch v. Can. N. W. Land Co., 19 S. C. R. 204; overruling Ross v. Torrance, 2 Leg. News (Mont.) 186; 2 Cart. 352; Murne v. Morrison, 1 B. C. (pt. 2) 120; and Schultz v. Winnipeg, 6 Man. L. R. 35.

[6] *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.

21. Bankruptcy and insolvency. (*l*)

---

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." [7]

A provincial legislature may empower a provincial company to borrow money at any legal rate of interest.[8]

(*l*) "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]

[7] 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.

[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; 1 Cart. 63. A provincial Act which, in view of the embarrassed state of the company's finances, forced commutation upon certain annuitants was upheld as relating to a matter of a local or private nature (No. 16 of s. 92). It was in this case that the P. C. expressed the view that legislation under s. 91 must, in every instance, be general legislation. See *ante*, p. 165. The latter part of this extract supports what has been said (see *ante*, p. 184) in reference to bankruptcy and insolvency being legal relations the creation of which out of any given combination of circumstances is in the power of the Dominion parliament alone. In

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:[10]

"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

the absence of any such legislation, it is difficult—in view of the scope attributed to No. 13 of s. 92, "property and civil rights in the province"—to see on what ground provincial legislation, making provision for the distribution of a man's estate among his creditors, and for his discharge from liability upon his contractual obligations, can be impugned. The Privy Council, however, has stated that a provincial legislature cannot pass a bankruptcy Act: Fisheries Case, see extract *ante*, p. 180; and in the Voluntary Assignments Case (see *post*, p. 222) their Lordships lay stress upon the absence of *compulsory* provisions in the provincial Act upheld in that case as showing that it was not a true bankruptcy Act. The question is also discussed *ante*, p. 185.

[10] Cushing v. Dupuy, 5 App. Cas. 409; 49 L. J. P. C. 63; 1 Cart. 252. The general rule is discussed *ante*, p. 186. The decision of the P. C. 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. 64.

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, so far as a general law relating to those subjects might affect them."

There is now no such general law in force in Canada,[1] 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*.

"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. 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

[1] Except the Dominion Winding-up Acts relating exclusively to companies. See *post*, p. 223.

[2] Voluntary Assignments Case, (1894) A. C. 189; 63 L. J. P. C. 59; 5 Cart. 266. 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 (and other cases), 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.

[3] The Ontario "Creditors' Relief Act."

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.

"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 B. N. A. 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

[4] *I.e.*, the Dominion Insolvent Act, 1869.

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 B. N. A. 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, 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."[6]

The Dominion Winding-up Acts are insolvency legislation, and are properly made applicable to companies incorporated under provincial legislation.[7] They also apply to

[5] See note *ante*, p. 219. 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.

[6] See *ante*, pp. 179, 183, 186.

[7] Re Eldorado Union Store Co., 6 Russ. & Geld. 514; Shoolbred v. Clark, 17 S. C. R. 265; 4 Cart. 459.

Imperial companies, the power in such case being limited, of course, to dealing with the realization and distribution of the assets in Canada.[8] But the Dominion parliament cannot pass an Act for the liquidation of all building societies in a province, whether solvent or not.[9] Provincial Winding-up Acts are *intra vires* so long as they are not true "bankruptcy and insolvency" legislation.[10]

It was early held [1] 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.[2] 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

[8] Allen v. Hanson, 18 S. C. R. 667; 4 Cart. 470. 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, referred to *ante*, p. 182. 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.

[9] McClanaghan v. St. Ann's Mut. Bldg. Soc., 24 L. C. Jur. 162; 2 Cart. 237.

[10] This would seem to be a proper deduction from the decision in the Voluntary Assignments Case, *supra*. See *Re* Wallace-Henstis 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.

[1] Reg. v. Chandler, (1868) 1 Hannay 556; 2 Cart. 421.

[2] See the remarks of Burton, J.A., in Clarkson v. Ont. Bank, *ubi supra*.

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 repealing it.[3] 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.[4]

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*.[5] 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[6]; 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.[7]

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

[3] McAlmon v. Pine, 2 Pug. 44; 2 Cart. 487.

[4] 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). See notes to No. 14 of s. 92 "procedure in civil cases."

[5] McLeod v. Vroom, Trueman's N. B. Eq. Cas. 131; *Re* De Veber, 21 N B. 401; 2 Cart. 552.

[6] Johnson v. Poyntz, 2 Russ. & Geld. 193.

[7] Munn v. McConnell, 2 P. E. I. 148; and see *In re* Blackburn, 2 P. E. I. 281. The decision of the P. C. in the Voluntary Assignments' Case (*supra*), 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 the operation of any general insolvency legislation passed by the Dominion parliament.

22. Patents of invention and discovery. (*m*)

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.[8]

(*m*) 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[9] and provides special procedure[10] and to some extent a special tribunal[1] for the trial of patent cases.

[8] Murdoch v. Windsor and Ann. Ry. Co. Russ. Eq. Rep. 137; 3 Cart. 368. This decision must be considered overruled by the judgment in *Re* Windsor & Annapolis Railway, 4 Russ. & Geld. 312; 3 Cart. 387, 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 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. Bélisle, L. R. 6 P. C. 31, and the Act in its relation to local undertakings upheld upon the authority of that case.

[9] Tennant v. Union Bank, extract *ante*, p. 175; Cushing v. Dupuy p. 167. See the general discussion of this rule, *ante*, pp. 183-6.

[10] Aitcheson v. Mann, 9 P. R. (Ont.) 473: the provision in the Patent Act of 1872 as to the place of trial of a patent action is *intra vires*. See Flick v. Brisbin, 26 O. R. at p. 426 and Short v. Fed. Brand Co., 6 B. C. 385, 436.

[1] Re Bell Telephone Co., 7 O. R. 605, in which it was held that by the Act the Minister of Agriculture or his deputy is constituted a judicial tribunal for the trial of certain patent cases. See notes to No. 14 of s. 92, *post*.

23. Copyrights. (*n*)

24. Indians and lands reserved for the Indians. (*o*)

The late Master in Chambers in Ontario (Mr. Dalton, Q.C.) was of opinion[2] 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.[3]

(*n*) The power of the Dominion parliament to legislate upon this class is circumscribed by Imperial Acts of colonial application.[4] So far as concerns the line of division between the parliament of Canada and the provincial legislatures it is clear[5] 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.

(*o*) The proclamation which followed upon the Treaty of Paris 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."[6] The interest

[2] Reg. v. Pattee, 5 P. R. (Ont.) 292.

[3] Mousseau v. Bate, 27 L. C. Jour. 153; 3 Cart. 341. The question as to the position of provincial Attys.-Gen. is discussed in the notes to No. 14 of s. 92, *post*.

[4] See Smiles v. Belford, 10 A. R. 436, where the situation is graphically described by (Thos.) Moss, J.A., afterwards C.J.O.; also Anglo-Can. Music Pub. v. Suckling, 17 O. R. 239; Black v. Imp. Book Co., 5 O. L. R. 184. The subject is more fully discussed, *ante*, p. 29, *et seq.*

[5] Tennant v. Union Bank, passage quoted *ante*, p. 175; Cushing v. Dupuy, extract *ante*, p. 167. See also notes to No. 22 of s. 91, *ante*, p. 226, and to No. 14 of s. 92, *post*.

[6] See Houston, "Const. Doc. of Can.," 67.

of the Indians under this proclamation has been held to be "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."[7] From time to time Indian tribes had surrendered their title to portions of this 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[8] the above sub-section 24 applied only to these, and not to the larger indefinite areas covered by the proclamation of 1763; but this view has been 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.[9]

"Prior to that surrender[10] the province of Ontario had a proprietary interest in the land under the provisions of section 109 of the B. N. A. 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."[1]

This item 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

[7] St. Catherines Milling Co. v. Reg., 14 App. Cas. 46; 58 L. J. P. C. 59; 4 Cart. 107.

[8] Church v. Fenton, 5 S. C. R. 239; 4 O. A. R. 150; 28 U. C. C. P. 384; 1 Cart. 831.

[9] St. Catherines Milling Co. v. Reg., *ubi supra.*

[10] By the North-West Angle Treaty of 1873.

[1] Ontario Mining Co. v. Seybold, (1903) A. C. 73; 72 L. J. P. C. 5.

25. Naturalization and aliens. (*p*)

become the free public lands of the province, as an Indian reserve in infringement of the proprietary rights of the province."[2] The treaty of 1873 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[3] and a Dominion patent for the lands in dispute was held invalid and title under a provincial patent was upheld.

(*p*) By the Imperial Naturalization Act, 1870, it is enacted 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. . . ."

While, therefore, as between the Dominion and the provinces, this subject is exclusively with the former, no legislation by the parliament of Canada can make an alien a British subject *quoad* the Empire: it can do no more than

[2] *Ib.*; see *ante*, p. 163, and *post*, sec. 108, as to the marked distinction between legislative powers and proprietary rights.

[3] Ontario Mining Co. v. Seybold, 31 O. R. 386; 32 O. R. 301; 32 S. C. R. 1; (1903) A. C. 73; 72 L. J. P. C. 5. See also the Indian Claims Case, (1897) A. C. 199; 66 L. J. P. C. 11; referred to in the notes to s. 109, *post*.

give him, within the confines of the Dominion, the privileges or some of the privileges of naturalization. Where any question arises as to the national *status* of a person domiciled in a colony, such question must be determined by the law of England, whilst the rights and liabilities incident to that *status* must, in Canada, be determined by laws passed by the proper legislature in Canada.[4]

The scope of this class and the extent to which provincial legislatures are debarred from passing Acts affecting aliens and naturalized persons has been considered by the Privy Council in two recent cases.[5] In the earlier case an enactment by the British Columbia legislature that no Chinaman should be employed in mines was upheld in the courts of that province;[6] but on appeal the Privy Council reversed this decision and held the enactment *ultra vires*. In the later case a provision in the Electoral Act of the same province debarring from the franchise Chinamen and Japanese was held *intra vires* by the Privy Council, the earlier case being thus distinguished:

[4] Donegani v. Donegani, 3 Knapp. P. C. 63; *Re* Adam, 1 Moo. P. C. 460. Connected with this subject is the question of the territorial operation of Canadian legislation discussed *ante*, p. 62 *et seq.* As Canadian legislation cannot invest an alien with the character of a British subject outside Canada, so, it is submitted, it cannot visit upon natural born British subjects resident in Canada any penalty for acts committed without the Dominion; for, without the Dominion, they are—*quoad* Canada—British subjects only and their *status* as citizens of Canada is nought. A *fortiori*, legislation in reference to the acts of aliens abroad would be invalid.

[5] Union Colliery Co. v. Bryden, (1899), A. C. 580; 68 L. J. P. C. 118; *Re* Tomey Homma, (1903), A. C. 151; 72 L. J. P. C. 23.

[6] 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; Reg. v. Wing Chong, 1 B. C. (pt. 2) 150; Reg. v. Gold Comm. of Victoria, 1 B. C. (pt. 2) 260; Reg. v. Victoria, 1 B. C. (pt. 2) 331, and Reg. 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 of the P. C. in Bryden's Case, *ubi supra*, would seem to support those decisions; while the views expressed in Tomey Homma's Case, *ubi supra*, would overrule them. See *post*.

"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 their 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 this class "naturalization and aliens" or to harmonize the reasons given in support of the respective decisions; as the following extracts will show: (1) "Every alien when naturalized in Canada becomes *ipso facto* a Canadian subject of the Queen; and his children are 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; 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. . . . ."

"The provisions, of which the validity has been thus affirmed by the courts below, are capable of being viewed in two different aspects, according to one of which they appear to fall within the subjects assigned to the provincial parliament by section 92 of the B. N. A. 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 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, 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.* 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 rights of aliens. Mr. Justice Walkem appears to regard that fact as favorable 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 from legislating to

the full limit of its powers[7] 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."[8]

(2) "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. 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 the local constitution and laws.'[9] 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

[7] The 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 (see Lefroy, 459, 460 n), but the point has not been before the courts, the provincial Acts not being restrictive.

[8] Bryden's Case, (1899), A. C. 580; 68 L. J. P. C. 118.

[9] See *ante*, pp. 73-4, as to the value of U. S. decisions in the decision of cases under the B. N. A. Act.

26. Marriage and divorce. (*q*)

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.*[10] 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."[1]

(*q*) By No. 12 of section 92, provincial legislatures are empowered to legislate respecting "the solemnization of marriage in the province." No case, however, has arisen in our courts in reference to the line of division between the Dominion parliament and the local legislatures on this subject of marriage;[2] but this item and item No. 12 of section

[10] This 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."

[1] *Re* Tomey Homma, (1903), A. C. 151; 72 L. J. P. C. 23. The reconciliation of the conflicting views indicated in the italicized passages must be left to future adjudication. Meanwhile provincial legislation upon this subject may take a much wider scope than the views expressed in the earlier case would seem to warrant.

[2] "The phrase 'the laws respecting the solemnization of marriages in England' occurs in the preamble of the Marriage Act (4 Geo. IV. c. 76, Imp.), an Act which is largely concerned with matters

27. The criminal law, (*r*) except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters.

92, will be found frequently compared and contrasted, and inferences drawn therefrom as to the proper principles of interpretation to be applied to the various other items of sections 91 and 92.[3] Judging from provincial legislation since Confederation, it would appear to be conceded that the scope of the first branch of this class is limited to legislation as to the *status* merely of husband, wife, and issue. So far, the scope of the second branch has been limited in practice to private bills legislation. No court for the trial of matrimonial causes has yet been established by Dominion legislation.

(*r*) "Criminal law" in its widest sense would deal with offences against provincial laws;[4] but by section 92 (No. 15) exclusive jurisdiction is conferred upon the provincial legis-

relating to banns and licenses, and this is therefore a strong authority to show that the same words used in the B. N. A. Act, 1867, were intended to have the same meaning."—Opinion of the law officers of the Crown in England, Dom. Sess. Pap., 1877: No. 89, p. 340. On the other hand, the words 'marriage and divorce' cover 'all matters relating to the status of marriage, between what persons and under what circumstances it shall be created, and (if at all) destroyed." *ib.* In Scott v. Scott, 4 B. C. 316, it was held that the provincial legislature cannot provide for an appeal to the full court in divorce cases, and that the Imperial Act providing for such appeals is inapplicable. See, however, the notes to s. 92, No. 14, *post*. It is submitted that, given a law permitting divorce, the administration of that law would *primâ 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. See *post*, p. 302.

[3] See Parsons' Case, extract, *ante*, p. 168, and Frederickton v. Reg., 3 S. C. R. 505.

[4] See Reg. v. Wason, 17 O. A. R. 221; 4 Cart. 578; *Re* Lucas and McGlashan, 27 U. C. Q. B. 81; Reg. v. Roddy, 41 U. C. Q. B. 291; L'Ass'n de St. J.-B. v. Brault, 30 S. C. R. 598. The parliament of Canada has endeavored to cover the entire ground by exacting that the infraction of a provincial law which is not otherwise made an offence shall be a misdemeanor and punishable as such: see Reg. v. Wason, *ubi supra*.

latures 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 within any of the classes of subjects enumerated in this section."

From the larger general class the smaller particular class must be excepted;[5] and it is now authoritatively recognized that provincial penal law[6] 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."[7]

The parliament of Canada can declare any act to be a crime and thus bring it within the purview of the "criminal law."[8] No doubt can arise, therefore, as to the validity of such an enactment even where there is similar provincial legislation.[9] The debatable ground is as to the scope of the provincial class, and these questions are suggested by the cases:

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. "Crimes"

[5] This rule is discussed *ante*, p. 198, *et seq.*

[6] See Reg. v. Bittle, 21 O. R. 605. MacMahon, J., delivering the judgment of the court, refers to the diversity of nomenclature applied to this class: "provincial criminal laws." (Russell v. Reg. 7 App. Cas. 829; 51 L. J. P. C. 77; 2 Cart. 12); "penal laws." (Pope v. Griffith, 16 L. C. Jur. 169; 2 Cart. 291); "a civil matter within the true meaning of these respective terms," (*Ex p.* Duncan, 16 L. C. Jur. 188; 2 Cart. 297).

[7] One question only is dealt with here: What is to be deemed "criminal law"? All other questions in connection with the administration of justice:—the constitution, maintenance and organization of courts, their jurisdiction, and the procedure to be followed both in civil and criminal matters—are discussed together in the notes to Nos. 14 and 15 of s. 92.

[8] Reg. v. Wason, 17 O. A. R. 221; 4 Cart. 578, *per* Burton and Osler, JJA.; Reg. v. Stone, 23 O. R. 46; L'Ass'n de St. J.-B. v. Brault, 30 S. C. R. 598, *per* Girouard, J. See also *per* Bain, J., in Reg. v. Shaw, 7 Man. L. R. 518; Reg. v. Robertson, 3 Man. L. R. 613; *Ex p.* Duncan, *ubi supra*. See, however, *per* Wetmore, J., in Reg. v. Frederickton, (1879), 3 P. & B. at p. 160; 2 Cart. 27.

[9] Reg. v. Stone, *ubi supra*.

was a most comprehensive term, and its definition by Richards, C.J., in 1868, may be taken as a correct exposition of the law as it stood at the date of Confederation:

"When a party may be punished for an offence against a public Act of a public nature, for which he may be tried summarily and a penalty imposed, the proceeding to recover such a penalty is a criminal proceeding, . . . then the offence for which the penalty is imposed must be a *crime*." [10]

The B. N. A. 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 B. N. A. Act a body of provincial penal law.[1]

Much may be advanced in favor 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,[2] but judicial opinion favors the view that this is by the B. N. A. 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.[3] On the same ground provincial legislation in Quebec authorizing lotteries

[10] *Re* Lucas and McGlashan, *ubi supra*. And see authorities noted *ante*, p. 235.

[1] Dobie v. Temp. Board, 7 App. Cas. 136; 51 L. J. P. C. 26; 1 Cart. 351; Local Prohibition Case, (1896), A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295.

[2] See *per* Osler, J.A., in Reg. v. Wason, *supra*.

[3] Reg. v. Lawrence, 44 U. C. Q. B. 164, affirming judgment of Gwynne, J. Compare with this case Reg. 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.

was held invalid,[4] and a Manitoba Act against the keeping of gambling houses was held to infringe upon the "criminal law" upon the same ground.[5]

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,[6] section 129 of the B. N. A. 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 this class No. 27 of section 91. For example, Killam, J., uses this language:[7]

"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 B. N. A. 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

[4] 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. On the subject of lotteries, see Reg. v. Harper, Q. R. 1 S. C. 333; Pigeon v. Mainville, 17 L. N. 7.

[5] Reg. v. Shaw, 7 Man. L. R. 518. The judgment of Dubuc, J., *dub.*, 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 civil aspect (cf. Reg. v. Wason, and Reg. v. Stone, *ubi supra*, and *post*, p. 243) so long as such provincial legislation is not repugnant to the Dominion enactment (Local Prohibition Case, (1896), A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295).

[6] *Ante*, p. 237.

[7] Reg. v. Shaw, 7 Man. L. R. 518. On appeal Taylor, C.J., expressed his entire concurrence in the judgment of Killam, J. Cf. Reg. v. Robertson, 3 Man. L. R. 613, upholding provincial game laws in the absence of Dominion legislation.

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 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 labor on the Lord's Day. An amendment of this section by a provincial Act extending it to corporations was held *ultra vires*,[8] 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,[9] and Barker, J., points out that not everything called "criminal law" in ante-Confederation legislation is

[8] Reg. v. Halifax Tram. Co., (1898), 30 N. S. 469. Reference is made to the fact that there is 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 B. N. A. Act, and covered the offence charged. The recent decision (July, 1903) of the Privy Council in the Lord's Day Case should be consulted. It holds broadly that Sabbath observance legislation falls within the "criminal law."

[9] *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."

to be deemed "criminal law" as meant in the B. N. A. Act, *because the federating provinces differed in this respect.*[10]

What is the test to be applied to any provincial enactment?

In what may be termed the leading case on the subject,[1] an Ontario Act directed to preventing fraud in the supplying of milk to cheese factories was in question. All the judges agreed that the case turned upon the question as to the true character and nature of the legislation.[2] In the court below the judges "arrived at diametrically opposite conclusions, the chief justice[3] 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 cheesemakers 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."[4] Do the prescribing clauses fall properly within any class enumerated in section 92 other 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."[5]

[10] The same difficulty was experienced in attempting to construe "municipal institutions," by reference to the position in that regard of the federating provinces at the date of the B. N. A. Act. See notes to No. 8 of s. 92, *post.*

[1] Reg. v. Wason, 17 O. A. R. 221; 17 O. R. 58; 4 Cart. 578, with which compare Reg. v. Stone, 23 O. R. 46.

[2] This rule is discussed *ante*, p. 193.

[3] Armour, C.J., with whom Falconbridge, J., concurred. The quotation is from the judgment of Osler, J.A., in appeal.

[4] *Per* Osler, J.A.

[5] *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." Mr. Justice Osler further says: "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

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 B. N. A. 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."—Per Hagarty, C.J.

"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."—Per 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 of the contracts and dealings between the parties in a

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," referring, among other cases, to Atty.-Gen'l v. Radloff, 10 Ex. 84, and Reg. v. Bradlaugh, 14 Q. B. D. 667. "Of course, the imposition of a penalty means little. Both legislatures may impose penalties."—*Per* Graham, E.J., in Reg. v. Halifax Tram. Co., 30 N. S. 469.

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."—Per 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."—Per Maclennan, J.A.

The principle of the above case has been recognized and adopted by the Supreme Court of Nova Scotia.[6] 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:[7]

"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.,[8] 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,[9] with the result that the ordin-

[6] Reg. v. Halifax Tram. Co., (1898), 30 N. S. 469. The case is also noted, *ante*, p. 239. Compare *Ex p.* Green, 35 N. B. 137, noted *ante*, p. 239.

[7] Russell v. Reg., 7 App. Cas. 829; 51 L. J. P. C. 77; 2 Cart. 12. The passage is quoted, *ante*, p. 171. See the note appended.

[8] Reg. v. Wason, *ubi supra*, *ante*, p. 241.

[9] Reg. 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 Reg. v. Wason, an Ordinance was upheld which provided that for 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.

ance 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."

To what extent does Dominion legislation bringing particular conduct within the "criminal law" prevent provincial legislation in reference to such conduct?

Mr. Justice Girouard says[10] that "the parliament of Canada may validly declare anything, even the most innocent local or private matter, to be a crime,"[1] and that such legislation would put an end to the jurisdiction of the provincial legislatures.[2]

On the other hand Armour, C.J., was of opinion[3] 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 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.[4] The Dominion further legislated along the line of the Ontario Act, and such legislation was held *intra vires*.[5]

"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 Reg.

[10] L'Ass'n de St. J.-B. v. Brault, 30 S. C. R. 598 (1900).

[1] The authorities for this proposition are noted *ante*, p. 236.

[3] 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.

[3] Reg. v. Wason, 17 O. R. 58; 4 Cart. 578.

[4] 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.

[5] Reg. v. Stone, (1892) 23 O. R. 46. See also Rex v. McGregor, 4 O. L. R. 198.

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,'" [6]

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.[7]

The problem calls at every turn for the application of the rule that the true nature and legislative character,[8] the pith and substance,[9] of the enactment which may be in question must be determined in order to refer it to its proper class.[10] Certain propositions, too, formerly discussed, in reference to the scheme of legislative distribution effected by the B. N. A. 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.[1] On the other hand, provincial legislatures cannot extend the borders of the class "criminal law" enumerated in section 91.[2] 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

[6] Compare the language of the P. C. in the Fisheries Case, (quoted *ante*, p. 207) in reference to double taxation.

[7] Fielding v. Thomas, (1896), A. C. 600; 65 L. J. P. C. 103; 5 Cart. 398. See also the discussion in the court below on this feature of the case, 26 N. S. 55; 5 Cart. 414.

[8] See Hodge v. Reg., 9 App. Cas. 117; 53 L. J. P. C. 1; 3 Cart. 144.

[9] See Bryden's Case, (1899), A. C. 580; 68 L. J. P. C. 118.

[10] This rule is discussed, *ante*, p. 193.

[1] See *ante*, p. 183, *et seq.*

[2] See *ante*, p. 186, *et seq.*

is not repugnant to Dominion legislation falling within this class No. 27 of section 91 or dealing with matters ancillary thereto, it is *intra vires*.[3]

As examples of what may be considered provisions relating to "criminal law" and criminal procedure or reasonably ancillary thereto, 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]

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

[3] See *ante*, p. 186, *et seq.* There is a curious passage in the judgment of the P. C. in the Local Prohibition Case, (1896), A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295: "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 peace, order, and good government 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 open to provincial legislation alongside the field of "criminal law" controlled by the parliament of Canada. See also the recent decision of the Privy Council in the Lord's Day Case (July, 1903).

[4] Ward v. Reid, 22 N. B. 279; 3 Cart. 405. The Dominion Act could, it is submitted, apply only to actions against justices for non-performance of duties imposed by Dominion legislation; and could modify the provincial law to that extent only. See also Whittier v. Diblee, 2 Pug. 243; 2 Cart. 492; 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. 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.

upon conviction has been satisfied shall be a bar to a civil action for damages.[5]

The Criminal Code (sec. 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]

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 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

[5] Wilson v. Codyre, (1886), 26 N. B. 516; Flick v. Brisbin, (1895), 26 O. R. 423. Mr. Lefroy (p. 443 n of his work), treats these cases and Aitcheson v. Mann, 9 P. R. (Ont.), 473 (see *ante*, p. 226), and *Re* Bell Tel. Co., 7 O. R. 605; 4 Cart. 618, (see *ante*, p. 226), as illustrating the principle that "in conferring some benefit or creating some right the Dominion parliament may impose as a condition upon those who avail themselves of that benefit or that right something which it would be *ultra vires* for it to enact otherwise."

[6] *Quære* in Pacquet v. Lavoie, 7 Que. Q. B. 277, by Blanchet, J. 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.

[7] *Ex p.* Ellis, 1 P. & B. 593; 2 Cart. 527. 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; 3 Cart. 266, more particularly noted, *ante*, p. 220.

[8] Compare the language of the P. C. judgment (quoted, *ante*, p. 221), in the Voluntary Assignments Case.

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. (*s*)

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. (*t*)

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: Subjects of exclusive Provincial Legislation.

---

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 B. N. A. 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 Supreme Court at Quebec not to fall within "procedure in criminal cases," but to be a proceeding in a civil matter.[9]

(*s*) Referring to the various classes of section 92, the only express exceptions are those mentioned in Nos. 1 and 10.[10]

(*t*) The nature of the legislative power which resides in provincial legislative assemblies has been fully discussed in

[9] Quebec Bank v. Tozer, 17 Que. S. C. 303. And see also Parent v. Trudel, 13 Q. L. R. 139.

[10] See notes to s. 92, No. 1, *post*, p. 248, and to s. 92, No. 10, *post*, p. 266.

1. The amendment, from time to time, notwithstanding anything in this Act, of the constitution of the province (*u*)

previous pages.[1] The limitations upon that power are: First, in respect of subject matter; Second, the territorial limitation;[2] Third, those general and implied limitations such as the necessary saving of Imperial sovereignty before referred to.[3] "*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."[4] "In so far as regards those matters which by section 92 are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act."[5]

(*u*) 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 affect the change; that any colonial legislation to that end would be repugnant to the provisions of the Union Act, 1840, which prescribed the form of political organization in the province. Accordingly, an Imperial Act was passed[6] 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 House of 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 validating all colonial legislation of like description,[7] but this Act, though applicable to all the colonies of the Empire, was retrospective, merely, in its operation.

[1] See *ante*, pp. 59, 89, 137, 139.
[2] See *ante*, p. 62 *et seq.*
[3] See *ante*, p. 60.
[4] Hodge's Case, passage quoted *ante*, p. 139.
[5] Liquidators' Case, passage quoted *ante*, p. 139.
[6] 17 & 18 Vic. c. 118. See Houston, "Const. Doc. of Canada," 177.
[7] "All laws heretofore passed or purporting to have been passed by any colonial legislature with the object of declaring or altering

In the next year, however, was passed the Colonial Laws Validity Act, 1865,[8] by the 5th section of which it was enacted that "5.— . . . . 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."

It may perhaps be contended that this section cannot apply to Canada as the B. N. A. Act, 1867, is of a later date;[9] and, certainly, so far as the latter statute contains express provision in reference to the matters referred to in the section, its 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 this section to any legislative body in Canada, where the field for the exercise of colonial legislative power is divided in such express terms by the B. N. A. 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 are to be performed, and has no relation to their sphere of authority.

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 Vic. c. 84).

[8] 28 & 29 Vic. c. 63 (Imp.). See Appendix B.

[9] See, however, Fielding v. Thomas, (1896), A. C. 600; 65 L. J. P. C. 103; 5 Cart. 398, in which the P. C. expressed the opinion that the above section of the Col. Laws Validity Act, 1865, would support Nova Scotian legislation as to the privileges of the assembly and its members. The judgment, however, is more expressly rested upon this class, No. 1 of s. 92. See the note, *ante*, p. 182.

except as regards the office of Lieutenant-Governor (*v*).

It is submitted, therefore, that the Dominion parliament has full power to alter the various provisions of the B. N. A. Act relating to *powers and procedure*, except where express or implied limitation upon such power is imposed by the Act.[10]

But no general power is expressly conferred upon the Dominion parliament to alter the federal constitution;[1] while power to amend the provincial constitution is expressly conferred upon the provincial legislatures by this item No. 1 of section 92. The maxim *Expressio unius exclusio est alterius* may perhaps, therefore, be invoked in denial of the power of the Dominion parliament along this line.[2] The argument cannot apply to the question of parliamentary procedure, but it does very strongly negative any power in the Dominion parliament to alter the federal constitution, that being a matter fixed by the agreement of the federating provinces and exhaustively dealt with by the B. N. A. Act. The difficulty is, perhaps, to define what provisions of the B. N. A. Act relate to the "constitution" and what to the "procedure" of the Dominion parliament.

(*v*) An Act of the Ontario legislature conferring upon the Lieutenant-Governor 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

[10] As for instance by s. 18, *ante* p. 104 *et seq.* See the notes to that section with particular reference to the passage quoted from the P. C. judgment in Fielding v. Thomas, *ubi supra.*

[1] For obvious reasons special power is conferred (see s. 40, *et seq.*) as to election matters. A provincial legislature may debar aliens, naturalized or not, from the franchise: *Re* Tomey Homma (1903), A. C. 151; 72 L. J. P. C. 23, more particularly referred to *ante*, p. 230 *et seq.*

[2] "That is a big question that it would be unwise to express any opinion upon. There is 'peace, order and good government':" *per* Lord Davey, during the argument of Fielding v. Thomas, as quoted in Lefroy, 699 (n). For a sharp warning against too free an application of the maxim referred to in the text, see Colquhoun v. Brooks, 19 Q. B. D. 406; 21 Q. B. D. 65; 57 L. J. Q. B. 70, 439.

2. Direct taxation within the province in order to the raising of a revenue for provincial purposes. (*w*)

offend against the exception—not being an amendment of the constitution "as regards the *office* of Lieutenant-Governor.[3] Boyd, C., speaking of this exception, puts the matter thus:[4]

"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 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 section 91, power to legislate as regards the office of Lieutenant-Governor is with the parliament of Canada.[5] Such legislation, however, would seem to be repugnant to the spirit of the B. N. A. Act. The office of Lieutenant-Governor is, as frequently said, a link in the chain of Imperial connection and the whole spirit of the B. N. A. Act is that this is one of those fundamental matters in the Canadian political organization which is matter of Imperial concern.[6]

(*w*) This item No. 2 authorizes the imposition of "direct taxation for a local purpose upon a particular locality within the province," and is not to be limited to direct taxation, "only for the purpose of raising revenue for general provincial purposes, that is, taxation incident on the whole pro-

[3] 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.

[4] 20 O. R. at p. 247; 5 Cart. at p. 548.

[5] 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 Lefroy, 100 (n 2).

[6] 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."

vince for the general purposes of the whole province."[7] And municipalities may be ordered to contribute toward provincial expenditures within their limits.[8]

What is direct taxation? In what may be called the leading case upon this class No. 2,[9] 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

[7] Dow v. Black, L. R. 6 P. C. 272; 44 L. J. P. C. 52; 1 Cart. 95. 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 as to the delegation of power (*ante*, p. 59), 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 s.-s. 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.

[8] Atty.-Gen. (B.C.) v. Victoria, 2 B. C. 1.

[9] Lambe's Case, 12 App. Cas. 575; 56 L. J. P. C. 87; 4 Cart. 7; followed in the Brewers' License Case, (1897) A. C. 231; 66 L. J. P. C. 34.

the first payers; and the excellence of an economist's definition 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:

"'Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons 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. Such are the excise or customs. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed he will recover the amount by means of an advance in price.'

"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. For these reasons, their Lordships hold the tax to be 'direct taxation.'"[10]

With this description of direct taxation may be compared that given by the same committee in an earlier case[1] where Mills' definition was also relied on. It was held that a stamp duty on "exhibits" filed in the course of judicial proceedings is not direct taxation:

"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

[10] Owing to the provision in the U. S. constitution that "no capitation or other direct tax shall be laid unless in proportion to the census," the authorities in the U. S. courts 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 B. N. A. Act. See Lefroy, 720 (n).

[1] Atty.-Gen. (Que.) v. Reed, 10 App. Cas. 141; 54 L. J. P. C. 12; 3 Cart. 190.

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 taxation, 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."

Provincial powers of taxation are not to be curtailed through fear of their injurious operation upon subjects committed to the Dominion parliament.[2]

Property within the province may be taxed without regard to the place of residence or domicile of the owner; and conversely, a person "found within the province"[3] may be lawfully taxed in respect or upon the basis of property situate without the province or of income derived from extra-provincial sources.[4]

[2] Lambe's Case, *ubi supra*. This is but a particular instance of the general rule discussed, *ante*, pp. 198-9.

[3] The expression is from Lambe's Case: "Any person found within the province may be legally taxed there. This bank is found to be carrying on business there and on that ground alone it is taxed." As to provincial taxation of federal officers, see notes to No. 8 of s. 91, *ante*, p. 209.

[4] This, it is submitted, is the correct deduction from the cases. See Lambe's Case, *ubi supra*: Nickle v. Douglas, 37 U. C. Q. B. at p. 62, *per* Burton, J.A.; and see also Colquhoun v. Brooks, 19 Q. B. D. 406; 21 Q. B. D. 65; 57 L. J. Q. B. 70, 439; and Lefroy, 760 (*n*), 769 (*n*). Of course, a provincial legislature cannot impose a lien or charge upon property beyond the province; the tax in such case would be enforcible only by process against the person taxed or against his property within the province. See, however, Leprohon v. Ottawa, 2 O. A. R. at p. 534, 1 Cart. at p. 605, where

There is no rule that taxation under the B. N. A. Act must be uniform or without discrimination.[5]

The only other class of section 92 expressly conferring 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;"[6] and the license fees there authorized have been finally held to be direct taxation.[7] 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[8] and the "maintenance" of certain provincial institutions[9] and of provincial courts[10] 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[1] 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."[2]

Hagarty, C.J., expresses an opinion against provincial taxation based upon property without the province. On the general subject of extra-territorial legislation: see *ante*, p. 62 *et seq.*

[5] See *ante*, p. 59.

[6] Nos. 5 and 15 are the only other express revenue items.

[7] Brewers' License Case, (1897), A. C. 231; 66 L. J. P. C. 34. See also the cases noted, *post*, p. 259.

[8] Section 92, No. 4.

[9] *Ib.*, Nos. 6 and 7.

[10] *Ib.*, No. 14.

[1] Atty.-Gen. v. Reed, 10 App. Cas. 141; 54 L. J. P. C. 12; 3 Cart. 190. See extract from this judgment, *ante*, p. 255.

[2] 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; 1 Cart. 117; but the above extract would indicate that the P. C. did not in 1884 consider the question determined by any previous decision of the Board. See also *per* Wilson, J., in Reg. v. Taylor, 36 U. C. Q. B. 183, at p. 201. Mr. Lefroy (p. 733, *et seq.*) deduces a contrary rule from the cases.

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[3] must be limited to such powers as such a legislature itself possesses under the other classes of section 92,[4] 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[5] the Court of Queen's Bench of that province held[6] 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[7] and the statute pronounced *ultra vires*. In the opinion of the court, the only exception to the limitation laid down in this class No. 2 is that expressed in No. 9, but as the Privy Council has since held that license fees are direct taxation,[8] the case may be taken as a decision that there is no exception to the rule laid down in this item No. 2. The Manitoba legislature surmounted the difficulty by 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

[3] Under s. 92, No. 8:—"Municipal Institutions."

[4] Local Prohibition Case, (1896), A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295. And see notes to No. 8 of s. 92, *post*. In Lynch v. Canada N. W. Land Co., 19 S. C. R. 204, Ritchie, C.J., speaks of the power of taxation as being essential to municipal institutions.

[5] Atty.-Gen. (Que.) v. Reed, *ubi supra*.

[6] Plummer Wagon Co. v. Wilson, 3 Man. L. R. 68.

[7] Dulmage v. Douglas, 3 Man. L. R. 562; 4 *ib*. 495.

[8] *Ante*, p. 257.

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.[9]

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.[10]

An annual tax on ferrymen and ferry companies.[1]

A tax, by way of license fee, upon insurance agents.[2]

A tax on laundries.[3]

A tax by way of license fee, on Canadian or foreign companies doing business in a province.[4]

A license tax on merchants, wholesale and retail.[5]

A tax on mortgages held by a loan company.[6]

A tax on physicians for the support of a college.[7]

A license tax on "any trade, profession, occupation, or calling."[8]

A stamp duty on sales of realty.[9]

A provincial legislature cannot, however, under the guise of a license fee impose indirect taxation. For example: the

[9] Crawford v. Duffield, 5 Man. L. R. 121.

[10] Brewers' License Case, (1897), A. C. 231; 66 L. J. P. C. 34; Fortier v. Lambe, 25 S. C. R. 422; Reg. v. Halliday, 21 O. A. R. 42. Severn v. Reg., 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.

[1] Longueuil Nav. Co. v. Montreal, 15 S. C. R. 566.

[2] English v. O'Neill, (1899), 4 Terr. L. R. 74.

[3] Lee v. Montigny, 15 Que. S. C. 607; but see Reg. v. Mee Wah, 3 B. C. 403.

[4] 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, *ubi supra*.

[5] Weiler v. Richards, (1890), 26 Can. Law Jour. 338 (B.C.). As to any supposed difference between wholesale and retail: see note *ante*, p. 204.

[6] *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.

[7] College de Médecins v. Brigham, (1888), 16 R. L. 283.

[8] *Ex p.* Fairbairn, (1877), 18 N. B. 4; Jones v. Marshall, (1880), 20 N. B. 61; *Ex p.* Diblee, 25 N. B. 119.

[9] Choquette v. Lavergne, R. J. Q. 5 S. C. 108; (*sub nom.* Lamonde v. Lavergne), 3 Q. B. 303.

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. (*x*)

---

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.[10] 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,[1] because it was held that, by whichever key interpreted, a stamp duty, such as was imposed by the Act, was not direct taxation.

And in a later case[2] their Lordships say:

"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."

(*x*) The prerogatives of the Crown in the matter of appointments to office are by this item clearly surrendered to the

[10] Atty.-Gen. (Que.) v. Queen Ins. Co., 3 App. Cas. 1090; 1 Cart. 117.

[1] Since settled by Lambe's Case; see *ante*, p. 253.

[2] Brewers' License Case, (1897), A. C. 231; 66 L. J. P. C. 34.

5. The management and sale of the public lands belonging to the province and the timber and wood thereon. (*y*)

---

control of the provincial legislatures, within their sphere. In the absence of any express statutory provision as to an appointment it should be made by the Lieutenant-Governor upon the advice of his ministers.[3] A statutory provision lodging the power of appointment with the Lieutenant-Governor is not legislation respecting the office of Lieutenant-Governor within the meaning of the exception in No. 1 of section 92.[4] Such, in fact, is the usual practice.

This item is the guarantee for the continuance of "responsible government." It covers the entire executive department of provincial government with the sole exception of the Lieutenant-Governor, and of the judges mentioned in section 96 of the B. N. A. Act, and it ensures that the people of the province, through the provincial assembly, shall always be able to make the members, high and low, of the provincial executive staff feel responsibility. There is an intimate connection between "tenure of office" and the power to withhold supplies, and the grant to colonial legislatures of the latter power necessarily carried with it that the tenure of office in the colony should be at their "pleasure."[5]

In many instances, particularly in connection with the administration of justice, the enforcement of federal law is in the hands of provincial officials.[6]

(*y*) "It must always be kept in view that, wherever public land with its incidents is 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

[3] This question is discussed in the notes to s. 9. *ante*, p. 80 *et seq.*

[4] The Q. C. Case, (1898), A. C. 247; 67 L. J. P. R. 17. The corresponding item (No. 8), of s. 91 is silent as to the *appointment* of federal officials.

[5] See *ante*, p. 12 *et seq.*

[6] This subject is discussed in the notes to Nos. 14 and 15 of s. 92. *post*.

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 (*z*).

---

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."[7]

The case from which the above extract is taken decided that the "lands reserved for the Indians" mentioned in No. 24 of section 91 become, when disencumbered of the Indian usufructuary interest, "public lands belonging to the province," or, perhaps it should be said, they are always such, subject to the encumbrance of that Indian interest.[8]

A province may impose such terms and conditions as it pleases upon the disposal of its lands or the timber thereon. For example, a license to cut timber may forbid export in an unmanufactured state; such a provision does not infringe upon the power of the Dominion parliament to regulate trade and commerce.[9]

(*z*) In a comparatively recent case before the Privy Council[10] it was "strongly insisted on that the power given to each province by No. 8 of section 92 to create municipal institutions in the province necessarily implies the right to endow these institutions with all the administrative functions which

[7] St. Catharines Milling Co. v. Reg., 14 App. Cas. 46; 58 L. J. P. C. 59; 4 Cart. 107.

[8] See notes to No. 24 of s. 91, *ante*, p. 227. The matter of public assets, revenue producing and otherwise, is more fully considered in the notes to the group of clauses of this Act which deal therewith—102, *et seq.*

[9] Smylie v. Reg., 31 O. R. 202; 27 O. A. R. 172.

[10] Local Prohibition Case, (1896) A. C. 348; 65 L. J. P. C. 25; 5 Cart. 295.

had been ordinarily possessed and exercised by them before the time of the union." [1] The contention was thus negatived.

"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

[1] This contention was in line with decisions by the Canadian courts, *e.g.*, Slavin v. Orillia, 36 U. C. Q. B. 159; 1 Cart. 688; Sulte v. Three Rivers, 5 Leg. News, 330; 2 Cart. 280; and see Keefe v. McLennan, 2 Russ. & Ches. 5; 2 Cart. 400; Reg. v. Justices of Kings, 2 Pugs. 535; 2 Cart. 499. In the first edition of this book (1892) these cases were thus discussed: "It must not be forgotten, however, 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 sub-division of the field between co-ordinate legislative bodies within the colony, and upon the principle of The Queen v. Burah 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. . . . As indicated in the above cases, 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. Now, admitting, for the sake of the argument, that the term 'municipal institutions' is 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, it is not conceivable that this Imperial Act is to 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. '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 unitarian form of government power all flows from the one source, but under a dual government power over any

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."

The position of provincial municipal corporations in reference to the federal parliament has recently been considered by Mr. Justice Meredith in a case[2] in which an order of the Railway Committee of the Privy Council allowing the City of Toronto to open a street across the line of the Grand Trunk Railway was brought into question.

"The defendants are a provincial municipal corporation created by, and acquiring all their powers under, provincial legislation. By virtue of such creation and existence alone it can act. Federal legislation has no power over it in that respect. If provincial legislation has not given the defendants the legal capacity to acquire and make new streets across Dominion railways, the parliament of Canada cannot confer that capacity upon them. And if provincial legislation has conferred that capacity upon them only upon their paying compensation for the right to cross, they can cross only upon so paying. Dominion legislation cannot confer the capacity without the condition."

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 (see *per* Burton, J.A., in the Local Prohibition Case, 18 O. A. R. at p. 586; 5 Cart. at p. 376). And accordingly such regulations by provincial legislation were upheld under this class No. 8 of s. 92. But, by the judgment of the Privy Council noted in the text, 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." See note *ante*, p. 201.

[2] G. T. R. v. Toronto, (1900) 32 O. R. 120.

It was held, however, that the legal capacity to acquire and open up such streets (conferred by the Ontario Municipal Act) was subject to the supervention of federal legislation respecting federal works and undertakings such as the Grand Trunk Railway; that the manner and terms of acquiring and making streets across such a railway was a proper subject for such supervening federal legislation; and that the parliament of Canada was within its powers in delegating authority to determine such questions to the Railway Committee.

A municipal corporation is, of course, subject to federal law competently enacted;[3] and the legislative authority of the Dominion parliament to confer powers and impose duties within the sphere of its authority upon such a corporation other than those conferred or imposed by provincial legislation would seem clear;[4] but the judgment of Meredith, J., above noted, denies in very general terms federal authority to confer corporate capacity.[5]

A provincial legislature may determine the mode of trying municipal election cases, name the tribunal, and regulate the procedure.[6]

[3] G. T. R. v. Toronto, *ubi supra;* Central Vermont Ry. v. St. John, 14 S. C. R. 288; 4 Cart. 326.

[4] On the principal of Valin v. Langlois, Atty.-Gen'l. v. Flint, etc., discussed *post*, p. 307. The Canada Temperance Act is one example of powers conferred and duties imposed upon municipalities by federal law. See *per* Sedgewick, J., in the Local Prohibition Case, 24 S. C. R. at p. 247; 5 Cart. at p. 357; *per* Dunkin, J., in Cooey v. Brome, 21 L. C. Jur. at p. 186; 2 Cart. at p. 388—cited in Lefroy, 521.

[5] Compare Toronto v. Bell Tel. Co., 3 O. L. R. 465; *Re* O. P. Co. and Niagara Falls, 6 O. L. R. 11; and other cases cited in notes to s. 92, No. 11, *post*, p. 280, as to the powers of federal and provincial companies. The question seems to turn upon the distinction, if any, between capacity and powers. Given the corporate entity created by provincial legislation, are not its capacity and powers, like those of the individual, dependent upon both Dominion and provincial legislation, each within its sphere?

[6] Crowe v. McCurdy (1885), 18 N. S. 301; Reg. *ex rel.* McGuire v. Birkett, 21 O. R. 162; Clarke v. Jacques, Q. R. 9 Q. B. 238. In the view of the P. C. these matters do not quite plainly fall within "the administration of justice in the province" (see Valin v. Langlois, 5 App. Cas. 115; 49 L. J. P. C. 37; 1 Cart. 158; and notes to s. 41, *ante*, p. 127), and these cases therefore are here noted. See notes to s. 92, Nos. 14 and 15, *post*.

9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes. (*a*)

10. Local works and undertakings (*b*) other than such as are of the following classes,—

(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and

---

(*a*) On the authorities as they now stand this item would seem to have been unnecessary.[7] It is a purely fiscal provision,[8] and although it has been held to authorize regulation of the trades and occupations licensed under it,[9] such regulation may well be grounded on No. 16 of section 92, "matters of a merely local or private nature in the province."[10] In its purely fiscal aspect, the license fees imposed under it have been held to be direct taxation,[1] and would therefore be equally valid under No. 2 of section 92; and no question would arise as to whether the occupation licensed was or was not *ejusdem generis* with those particularly mentioned in this class No. 9.[2] As intimated in the latest decision upon this class[3] it is difficult to discover a *genus* sufficiently wide to cover the various *species* mentioned, which would not practically cover all trades and occupations.

(*b*) Owing to the fact that works and undertakings of the classes covered by the exceptions are usually carried on by incorporated companies, the cases are complicated by considerations as to the powers possessed by such companies un-

[7] For this reason the subject of provincial taxation is dealt with as a whole in the notes to No. 2 of s. 92, "direct taxation within the province, etc.," *ante*, p. 251.

[8] Hodge's Case, 9 App. Cas. 117; 53 L. J. P. C. 1; 3 Cart. 144.

[9] *Ib.* as explained in the Local Prohibition Case, (1896) A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295.

[10] Local Prohibition Case, *ubi supra*, as explained in the Manitoba Liquor Act Case, (1902) A. C. 73; 71 L. J. P. C. 28.

[1] Brewers' License Case, (1897) A. C. 231; 66 L. J. P. C. 34. The item was probably inserted *ex majore cautela* because of the doubt which might well exist upon this point. See Lefroy, 377 (n. 2).

[2] Brewers' License Case, *ubi supra*.

[3] *Ib.*

der their acts or charters of incorporation, federal or provincial as the case may be, without reference, it may be, to the legislative jurisdiction of the parliament of Canada or of a province over the particular works and undertakings.[4] It is difficult and yet almost essential to a proper grasp of the subject to keep these two phases distinct; and it is proposed therefore to deal with this class No. 10, as far as possible, apart from any question as to corporate capacities and powers.

Except for the purpose of defining the federal sphere of authority, this class No. 10 would seem to be superfluous. In the cases[5] in which particular works and undertakings have been held to be local, provincial legislation in reference to them[6] has been based indifferently upon this class No. 10 or upon No. 16 of section 92, "matters of a merely local or private nature in the province."

[4] As indicated by Street, J., in Toronto v. Bell Tel. Co. (1902), 3 O. L. R. 465 (see *post*, p. 274) the difficulties thus arising may be removed in the case of Dominion companies by the exercise by the Dominion parliament of the power conferred by exception (*c*), thus bringing the works and undertakings within the exclusive legislative jurisdiction of the federal parliament.

[5] *E.g.*, *Re* Lake Winnipeg Transportation Co., 7 Man. L. R. 255; Union Colliery Co. v. Bryden, (1899) A. C. 580; 68 L. J. P. C. 118; Hull Elec. v. Ottawa Elec., (1902) A. C. 237; 71 L. J. P. C. 58.

[6] Local works and undertakings may, of course, become federal as the result of the exercise by the parliament of Canada of the power conferred by exception (*c*). But, apart from this, what is meant by local works and undertakings? The term cannot, it is submitted, be so construed as to enlarge the provincial sphere of authority beyond the limits defined in the other classes of s. 92: it must, in other words, be interpreted upon the same principle as is applied to "municipal institutions" (see notes to No. 8 of s. 92, *ante*, p. 262), and "the incorporation of companies" (see notes to No. 11 of s. 92, *post*, p. 280). However, it should be noted, it was held by Mr. Justice Osler in Jones v. Can. Cent. Ry. (46 U. C. Q. B. 250), that provincial legislation in reference to the bonds of a railway company falling within this class No. 10 is operative to govern bonds held out of the province: "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." 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.

Works and undertakings falling within the exceptions are, of course, by virtue of item No. 29 [7] of section 91, within the exclusive jurisdiction of the federal parliament. Dominion legislation in reference to such works and undertakings is of paramount authority so long as it strictly relates to them or is reasonably ancillary to the main object of the legislation.[8] Within these limits it may interfere with and modify or supersede provincial legislation. Provincial legislation strictly relating to such works and undertakings is incompetent; [9] but in the absence of Dominion legislation upon what may be deemed ancillary topics provincial legislation in reference thereto would have operation.[10] The question has most frequently arisen in reference to

Dominion Railways.—The following provisions in the Railway Act of Canada have been held *intra vires:*

The provisions rendering ineligible as a director of a railway company any person holding any office in the company, or being interested in any contract with it:—*Held* by the courts of Quebec (and affirmed by the Supreme Court of Canada "for the reasons given in the court appealed from") that the federal parliament may legislate "on all incidents which may be required to carry out the object it had in view, provided such incidents are essentially and strictly connected with the principal object; and the capacity or incapacity of directors is a matter essentially connected with the internal economy of a railway company.[1]

The section giving to any person injured by the failure of the railway company to observe any of the provisions of the Act a right of action "for the full amount of damages sustained:"—*Held,* by the Court of Appeal for Ontario that

[7] "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."

[8] The general rule is discussed, *ante,* p. 186.

[9] See *ante,* p. 186.

[10] See *ante,* p. 186.

[1] Macdonald v. Riordan, (1899) 30 S. C. R. 619; 8 Que. Q. B. 555. This case may perhaps be deemed an authority as to the range of Dominion power in relation to the incorporation of companies rather than to railways.

the provincial "Workmen's Compensation for Injuries Act" which places a limit upon the amount recoverable by an employee of the company in such cases did not apply.[2]

Those clauses of the Act which give to the railway committee of the Privy Council power to decide questions as to the crossing of highways by railways and to apportion between the railway company and the municipalities concerned the cost of the necessary structures:—*Held* by the Court of Appeal for Ontario, affirming the judgment of Rose, J., that such provisions were fairly warranted in railway legislation.[3]

The clause limiting the time within which an action may be brought for injury sustained by "reason of the railway:"—*Held* by the Supreme Court of New Brunswick a provision reasonably incident to railway legislation.[4] The

[2] Curran v. G. T. R., (1898) 25 O. A. R. 407.

[3] *Re* C. P. R. & York, (1898) 25 O. A. R. 65; (1896) 27 O. R. 559. Burton, 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. Osler, J. A., adhered to the views expressed by him in McArthur v. N. & P. Ry. (*infra*, p. 270), and of the clauses in question 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.

[4] Levesque v. N. B. Ry. Co., (1899) 29 N. B. 588. The defendant company was originally incorporated by a pre Confederation Act (N. B.), 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. King, J., expressed doubt as to the clause allowing the

Court of Appeal for Ontario was evenly divided upon this point.[5]

The provision that no provincial railway shall cross a Dominion railway without the approval of the Railway Committee of the Privy Council:—*Held* to be a provision necessarily incident to railway legislation.[6]

The line of demarcation between Dominion and provincial powers in reference to federal railways is indicated in two recent decisions of the Privy Council.[7] 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

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., fully noted *post*, p. 279; and St. Joseph v. Que. Cent. Ry., 11 Q. L. R. 193, as to the abrogation of provincial Acts by the exercise of the power conferred by exception (*c*).

[5] McArthur v. N. & P. June. Ry., (1890) 17 O. A. R. 86; 4 Cart. 559. 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.

[6] Credit Valley Ry. v. G. W. Ry., (1878) 25 Grant, 507, *per* Proudfoot, V.C.; C. P. R. v. N. P. & Man. Ry., (1888) 5 Man. L. R. 313, *per* Killam, J. In the former case it was held that the provincial road would also have to procure the approval of the provincial Minister of Public Works under the provincial Railway Act. In view of the paramount authority of Dominion legislation within its competence (see *ante*, p. 183) provincial legislation as to these crossings must give way before repugnant Dominion legislation. See also *Re* Portage Extension of R. R. V. Ry., Cass. Sup. Ct. Dig. 487, noted at some length in Lefroy, pp. 604-5. In Booth v. McIntyre, 31 U. C. C. P. 193, the point was discussed, but not determined, as to the power of the Dominion parliament to authorize a federal railway to expropriate public lands of a province for the purposes of the line without the consent of the Lieut.-Gov. in Council.

[7] C. P. R. v. N. D. de Bonsecours, (1889) A. C. 367; 68 L. J. P. C. 54; Madden v. Nelson & F. S. Ry., *ib.* 626, 148.

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 C. P. R. v. N. D. 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, 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 B. N. A. Act, whilst it gives the legislative control of the appellants' railway *qua* 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; 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,[8] applicable to those lines which were placed under

[8] As to contracts for carriage of freight, etc., see *per* Taschereau, J., in Parsons' Case (4 S. C. R. at p. 307; 1 Cart. at p. 326):—"The contracts to convey passengers and goods on the railways under Dominion control, for instance, the contract 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

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[9] competent to the legislature of Quebec."

In a number of other cases provincial legislation has been held operative in respect to federal railways. For example:

Those parts of the Ontario "Workmen's Compensation for Injuries Act" which do not touch the structural arrangement of a railway are applicable alike to federal and provincial roads.[10]

by incorporation and the powers under the exceptions specified in this class No. 10 of s. 92 (see the judgment of the P. C. in Parsons' Case, 7 App. Cas. 96; 51 L. J. P. C. 11; 1 Cart. 265; *post*, p. 281), no doubt has been cast upon the main proposition: but, it is submitted, provincial laws as to such contracts would govern in the absence of express federal legislation. See *ante*, p. 186.

[9] But see the notes to No. 8 of s. 92, *ante*, p. 264. This passage must not, it is submitted, be taken to mean that such legislation falls within "municipal institutions;" it would appear to be municipal in the sense of dealing with a merely local matter within the province, No. 16 of s. 92.

[10] In Washington v. G. T. R. (1897), 24 O. A. R. 183, Osler, J.A., thus sums up the earlier authorities:—"In Monkhouse v. G. T. R., 8 O. A. R. 637, 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. C. S. R., 30th June, 1889, approved in C. S. R. v. Jackson, 17 S. C. R. 316, where

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.[1]

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:

The Supreme Court of Canada, following the principle of the recent Privy Council decisions,[2] 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.[3]

A provincial mechanics' lien Act has been held repugnant to the Dominion Railway Act and therefore inapplicable to a federal railway.[4]

Those parts of provincial Railway Accidents Acts and Workmen's Compensation for Injuries Acts which relate to

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 C. S. R. 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 B. N. A. 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, 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." See, however, Curran v. G. T. R. (1898) 25 O. A. R. 407, noted *ante*, p. 269.

[1] Baie des Chaleurs Ry. v. Nantel, (1896) Q. L. R. 9 S. C. 47; 5 Q. B. 65, Hall and Wurtele, JJ., dissenting. See, however, Bourgouin v. M. O. & O. Ry., *infra;* Redfield v. Wickham, 13 App. Cas. 467; and the cases noted, *post*, p. 292, *et seq.*, as to the right of a provincial attorney-general to bring action against a federal railway for acts *ultra vires* or in alleged contravention of its charter.

[2] See *ante*, p. 271.

[3] G. T. R. v. Therrien (1900), 30 S. C. R. 485. And see G. T. R. v. Huard (1892), Q. R. 1 Q. B. 502.

[4] Larsen v. Nelson & Ft. S. Ry. (1895), 4 B. C. 151.

undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province; (*c*)

---

the structure and arrangement of the railway plant have been held not to apply to federal railways.[5]

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.[6]

(*c*) "It appears to me that the connection between the two provinces required by clause (a) is a real and physical one and not a mere paper one created by a charter, the works under which may never extend to the limits of the single province in which they are begun or may never be begun at all. The word 'undertakings' would be satisfied by the actual operation of a line of steamships, leaving the word 'works' to apply to the other objects mentioned or referred to in the section. And it is to be borne in mind that any inconveniences which might otherwise arise under this construction could always be avoided by a declaration in a Dominion charter that the works contemplated by it were for the general benefit of Canada."[7]

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 pro-

[5] See extract from the judgment of Osler, J.A., in Washington v. G. T. R. (*ante*, p. 272), in which the authorities are summarized.

[6] Bourgoin v. M. O. & O. Ry., 5 App. Cas. 381; 49 L. J. P. C. 68; 1 Cart. 233.

[7] *Per* Street, J., in Toronto v. Bell Tel. Co. (1902), 3 O. L. R. 465. His Lordship cites Reg. v. Mohr, 7 O. L. R. 183; 2 Cart. 257; Parsons' Case, 7 App. Cas. 96; 51 L. J. P. C. 11; 1 Cart. 265; Colonial Bldg. Assn. v. Atty.-Gen. (Que.), 9 App. Cas. 157; 53 L. J. P. C. 27; 3 Cart. 118; Tennant v. Union Bank, (1894) A. C. 31; 63 L. J. P. C. 25; 5 Cart. 244.

(*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 ad-

---

vince, such railway being a local work and undertaking within this class No. 10, although, as appeared by the 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.[8]

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[9] to fall within No. 2 of section 92,[10] or under No. 16.[1] It was held not to be touched by this No. 10 at all. A question, however, was raised in that case which the committee abstained from deciding, namely: Does exception (a) apply to a railway extending from one province, not into another, but into a foreign country? The limitation of exception (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 one province into a foreign country. It is submitted that a provincial legislature has no such power, nor indeed has the Dominion parliament so far as the operation of the road without Canada is concerned.[2] So far as the incorporation of any such company is concerned No. 11 of section 92 would appear to prevent action by a provincial legislature, as the object would not be provincial.

[8] 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.

[9] Dow v. Black, L. R. 6 P. C. 272; 44 L. J. P. C. 52; 1 Cart. 95.

[10] "Direct taxation within the province, etc.," see *ante*, p. 253.

[1] "Generally all matters of a merely local or private nature in the province." See *post*, p. 313.

[2] See *ante*, p. 62, *et seq.*

vantage of Canada, or for the advantage of two or more of the provinces. (*d*)

(*d*) In 1880. Cameron, J., said: "It may be that sub-section 10 has relation solely to works of a public character to be undertaken at the public expense. and not to works of a quasi-private character such as a railway to be constructed by a private company; in which view the Dominion parliament will be unable to give itself jurisdiction. and exclusive power of legislation would be confined to the local legislature under sub-section 11, if that section in fact gives power to create a corporation and is not confined to the making of a general law or laws under which companies with provincial objects may be incorporated." [3]

In the same year the Privy Council dealt with a case[4] in which a railway constructed by a private company under a provincial Act had been declared a work for the general advantage of Canada, and no doubt appears to have been suggested as to the jurisdiction of the Dominion parliament to make such a declaration as to such a railway; and no subsequent case lends any support to the suggestion advanced by Cameron, J.

Again, it has been argued[5] that exception (c) was not meant to include any works or undertakings of the classes indicated in (a) and (b)—*e.g.* railways—but was intended to provide for public works and undertakings which the federal parliament might be prepared to sanction and execute; but no decided case bears out such a view and the practice is entirely in a contrary sense.

It has also been made a question by individual judges whether this exception (c) warrants general legislation declaring a particular class or classes of works and undertak-

[3] *Re* Junction Ry. & Peterborough. 45 U. C. R. at p. 317.

[4] Bourgoin v. M. O. & O. Ry., 5 App. Cas. 381; 49 L. J. P. C. 68; 1 Cart. 233.

[5] By Mowat, A.-G., in *Re* Portage Extension, quoted in Lefroy, p. 604.

ings to be for the general advantage of Canada.[6] The weight of judicial authority would appear to favor the view that at all events the declaration must be express and will not be implied.[7]

The effect of such a declaration by the parliament of Canada has been recently exhaustively discussed by Street, J., in connection with the position of the Bell Telephone Company.[8] The company was originally incorporated by Act of the parliament of Canada which authorized the establishment of telephone lines in the several provinces. But there was no express provision as to connecting two or more provinces,[9] and on this ground the Act of Incorporation was held *ultra vires* by the Court of Queen's Bench at Quebec,[10] a view which cannot now be sustained.[1] In Ontario, a provincial Act was passed conferring powers upon the company (treating it as a duly incorporated company) and afterwards a Dominion Act declared the companies' works and undertakings to be for the general advantage of Canada. In this state of affairs question arose as to the company's powers in the matter of stringing wires along the streets of Toronto, the solution of the question depending upon whether the provincial Act was or was not still operative. In deciding that the company continued to be bound by the restrictive clauses of the provincial Act, Street, J., says:[2]

[6] Several *dicta* are referred to in Lefroy, 603-4. See also St. Joseph & Que. Cent. Ry., 11 O. L. R. 193. As no case has turned upon the point further discussion of it is deemed unnecessary.

[7] *Ib* See, however, *Re* Ont. Power Co., (1903) 6 O. L. R. 11; in which Britton, J., held that the company's charter by irresistible inference contained such a declaration, basing his judgment upon the fact (*inter alia*) that the Dominion parliament alone had power over the water, the company's source of supply.

[8] Toronto v. Bell Tel. Co. (1902), 3 O. L. R. 465.

[9] As to this, Street, J., says:—"The Act of incorporation . . . does not in express terms require, although it certainly authorizes, a connection by means of their lines of two or more provinces."

[10] Reg. v. Mohr, 7 Q. L. R. 183; 2 Cart. 257.

[1] Col. Bldg. Assn. v. Atty.-Gen. (Que.), 9 App. Cas. 157; 53 L. J. P. C. 27; 3 Cart. 118. See notes to No. 11 of s. 92, *post*.

[2] The two questions as to (*a*) corporate capacity under federal incorporation, and (*b*) conferred powers under both Dominion and provincial legislation are so intermingled here that it is not deemed advisable to attempt segregation, the distinction being so clearly drawn in the judgment.

"The power of the Canadian parliament extends to the granting of charters of incorporation to companies with Canadian, as distinguished from provincial, objects, and to declaring the objects of their incorporation; but, except in the case of companies incorporated for carrying into effect some of the laws mentioned in section 91, the mere fact of a Canadian incorporation does not carry with it the right of interfering with property and civil rights in the different provinces in any way, no matter how strongly the objects of incorporation may seem to require such interference.[3] In order that such companies may entitle themselves to do so, it is necessary that they obtain the authority of provincial legislation."[4] . . .

"It appears to me to be necessary to consider and determine the *status* of the defendants upon their incorporation by the Dominion Act in order to decide whether the Ontario legislature had the power to alter the defendants' powers under it so far as its operations were carried on in this province. They would clearly not have that power if the Dominion legislature had in the first place declared their works to be for the general benefit of Canada, for I am of opinion that the objects of the charter are within the classes referred to in (a) of No. 10 of section 92. Nor would they have that power if it were to be held that a mere charter connection were sufficient, without an actual physical connection,[5] to exclude the jurisdiction of the provincial legislature, and that such a charter connection had been created by the terms of the defendants' Act of incorporation."[6]

"Where a company has been carrying on works in a province under a provincial Act of incorporation, if the Dominion parliament simply declares its works to be for the general advantage of Canada, without more, the result is that the company continues to work under the provincial Acts until they are altered or amended by Dominion legislation; the provincial Acts are not repealed by the mere fact that the

[3] But see *Re* Ontario Power Co. referred to in the note, *ante*, p. 277.

[4] Toronto v. Bell Tel. Co. (*ubi supra*), at p. 470.

[5] As to this, see *ante*, p. 274.

[6] At pp. 471-2.

11. The incorporation of companies (*e*) with provincial objects. (*f*)

---

company has come under the jurisdiction of the Dominion parliament. . . . It was easily within the power of the Dominion parliament upon assuming legislative jurisdiction over the defendants to have declared the provisions of the Ontario Act no longer binding upon them. . . . The defendants must therefore still be held entitled to all the rights and subject to all the restrictions contained in it which are not found to be abrogated by absolutely inconsistent provisions in the Act of incorporation."[7] . . .

"The next question is whether the Ontario Act in so far as it is not consistent with the Dominion Act must be taken to be repealed by the latter. In my opinion I ought not so to hold. I think the proper construction of these Acts is to treat the Ontario Act as conferring special rights upon the defendants in regard to their works in that province and at the same time subjecting them to the necessity of obtaining the consent of the local municipalities to the use of the streets, while leaving to their Act of incorporation its full operation in the other provinces."[8]

(*e*) "The incorporation of companies with objects other than provincial falls within the general powers of the parliament of Canada";[9] that is to say, the power is grounded upon the opening residuary clause of section 91.

The fact that a company, so incorporated, may not see fit to extend its operations beyond one province does not affect its status as a duly incorporated company, or render its Act of incorporation *ultra vires*.[10] The difference between a Do-

[7] At pp. 473-4.

[8] At pp. 476-7. And he points out that if this is unsatisfactory the Dominion parliament has power to exclude provincial legislation. The Court of Appeal for Ontario has just reversed the judgment of Street, J., apparently on this last point only.

[9] Parsons' Case, 7 App. Cas. 96; 51 L. J. P. C. 11; 1 Cart. 265.

[10] Col. Bldg. Assn. v. Atty.-Gen. (Que.), 9 App. Cas. 157; 53 L. J. P. C. 27; 3 Cart. 118. In Reg. v. Mohr, 7 Q. L. R. 183; 2 Cart. 257, (see *ante*, p. 277), the court of Queen's Bench (Que.), had held *ultra vires* the Dominion Act incorporating the Bell Telephone Co. The

minion and a provincial company is in the territorial sphere within which the company's powers may be, not in that within which they are actually, exercised.

A company incorporated under Dominion legislation can exercise no power which its creator could not directly exercise; its Act of incorporation can confer corporate capacity merely and powers in relation to matters within the legislative competence of the federal parliament.[1] And so of a provincial company. Its *status* and corporate capacity are determined by its Act of incorporation; its powers must come from that legislature which has jurisdiction over the subject matter of such powers.[2]

A company of either description is bound by laws competently enacted whether by the legislature to which it owes its corporate existence or by another. For example:

Provincial companies are subject to Dominion Winding-up Acts.[3]

larger question as to how far the Dominion parliament can go beyond merely conferring corporate capacity is not touched upon in the judgment. No doubt was expressed by the court as to the power of the Dominion parliament to authorize the incorporation of a company with power to establish general telephone communication throughout the various provinces of the Dominion, or between any two of them. The judgment proceeded solely upon the ground that the Act in question gave the company no power to establish such a system, or to make such connection between two provinces. The work which was actually being carried on under this statute was held to be a local work falling within s.-s. 10, and, being such, it could only be authorized by a provincial Act. The judgment of the Privy Council, however, distinctly enunciates that the territorial extensibility of the power, and not the extent to which it is actually exercised, is to decide the question as to which legislature should grant a charter of incorporation.

[1] Toronto v. Bell. Tel. Co.: see extract from the judgment of Street, J., *ante*, p. 278. In Tennant v. Union Bank, (1894) A. C. 31; 63 L. J. P. C. 59; 5 Cart. 244, the P. C. referred to the words "banking" and "the issue of paper money," occurring in collocation with "incorporation of banks," in No. 15 of s. 91 (see *ante*, p. 216), as indicating that the class is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers.

[2] As to the powers of a municipal corporation, see *ante*, p. 262; and note the judgment of Meredith, J., in G. T. R. v. Toronto, referred to *ante*, p. 264.

[3] Shoolbred v. Clark, 17 S. C. R. 265; 4 Cart. 459. See notes to No. 21 of s. 91, *ante*, p. 219.

And they must observe the requirements of federal law as to "navigation and shipping."[4]

And, in the absence of federal legislation,[5] they are subject to provincial law regulating the trade they carry on.[6]

The question is thus dealt with in the case last cited:

"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.[7] But the latter Act does not assume to interfere with the constitution or *status* 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

[4] Queddy R. Boom Co. v. Davidson, 10 S. C. R. 222; 3 Cart. 243; *Re* Lake Winnipeg Trans. Co., 7 Man. L. R. 255; and cases noted under No. 10 of s. 91, *ante*, p. 210.

[5] See the note to Parsons' Case, (7 App. Cas. 96; 51 L. J. P. C. 11; 1 Cart. 265), *ante*, p. 202.

[6] Parsons' Case, *ubi supra*.

[7] As to provincial Acts requiring extra-provincial companies to take out a license as a condition of the right to transact business in the province, see *Lefroy*, 624. And see *ante*, p. 182.

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 the later case[8] 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.

Speaking of the Act of incorporation in question in the 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,

[8] Colonial Bldg. Assn. v. Atty.-Gen. (Que.), 9 App. Cas. 157; 53 L. J. P. C. 27; 3 Cart. 118. And see Cooper v. McIndoe, 32 L. C. Jur. 210. In this connection also may be mentioned McDiarmid v. Hughes, 16 O. R. 570; 4 Cart. 701, 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 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 power 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. See notes to s. 9, *ante*, p. 89. The decision of Street, J. in Perry v. Clergue, 5 O. L. R. 357, that the grant of a license to operate a ferry between a port in Ontario and a foreign port can be made only by the Ontario government, is based upon proprietary rights under the word "royalties" in s. 109 of the B. N. A. Act (see *post*). The right to grant a license in Mortmain is not, it is submitted, such a royalty; so that the two decisions of Street, J., cannot be said to conflict.

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."

(*f*) What interpretation is to be put upon the words "provincial objects"? Has the word "provincial" reference here to territorial extension or to legislative jurisdiction? There is an early decision by the Supreme Court of Canada upon a reference from the Senate[9] that the words are to be construed in reference to the jurisdiction of the incorporating legislature. A bill to incorporate the Christian Brothers as a federal body was reported upon as *ultra vires* of the parliament of Canada, as infringing upon provincial powers in the matter of education.[10]

On the other hand, the decisions of the Privy Council in reference to Dominion companies and corporations[1] point strongly toward "territoriality"[2] as the test to be applied. If a provincial company must as a matter of corporate capacity exercise its powers (by whatsoever authority conferred)

[9] See Sen. Jour., 1876, Vol. 10, 150, 206.

[10] See *per* Taschereau, J., in Parsons' Case, 4 S. C. R. at p. 310; 1 Cart. at p. 329. In Forsyth v. Bury, (1888), 15 S. C. R. 543; Ritchie, C.J., and Strong, J., expressed the view that a Dominion Act incorporating the Anticosti company was *ultra vires* as dealing with property and civil rights in Quebec alone.

Dominion Ministers of Justice have objected to provincial Acts incorporating Boards of Trade and Chambers of Commerce on the ground that such Acts infringe upon federal jurisdiction over "trade and commerce." See Lefroy, 561. See also *per* Tessier, J., in Col. Bldg. Assn. v. Atty.-Gen. (Que.), 27 L. C. Jur. at p. 300; 3 Cart. at p. 137, to the effect that companies "for objects relating to property and civil rights" fall exclusively under the control of provincial legislatures; also *per* Palmer, J., in Queddy R. Boom Co. v. Davidson, 3 Cart. at p. 262; Lefroy, 620-1, 641 (n).

[1] Dobie's Case, 7 App. Cas. 136; 51 L. J. P. C. 26; 1 Cart. 351; Col. Bldg. Assn. v. Atty.-Gen. (Que.), 9 App. Cas. 157; 53 L. J. P. C. 27; 3 Cart. 118; Parsons' Case, 7 App. Cas 96; 51 L. J. P. C. 11; 1 Cart. 265.

[2] The late Sir John Bourinot considered this a convenient word to express the idea conveyed by the text: see his "Parl. Proc. and Pract.," 2nd ed., 676.

12. The solemnization of marriage in the province.

13. Property and civil rights in the province. (*g*)

---

only within provincial limits, it would seem to follow that transactions beyond the provincial boundaries would be *ultra vires;* but it has been recently held otherwise by the Supreme Court of British Columbia.[3] To the same effect is an earlier decision by the Master in Ordinary of Ontario (Mr. Thos. Hodgins, Q.C.) that an insurance company incorporated under a provincial statute can enter into insurance contracts abroad, *i.e.,* insuring property situated out of the province.[4]

(*g*) The words "property and civil rights" are here used in their largest sense. In what may be termed the

[3] Boyle v. V. Y. T. Co., 9 B. C. 213. "I think the true antithesis or phrase of exclusion is not 'Dominion objects' or 'extra-provincial objects,' but 'non-provincial objects' and that the phrase 'provincial objects,' includes both intra-provincial and extra-provincial objects,"—*per* Hunter, C.J., who, however, states the holding in Dow v. Black (L. R. 6 P. C. 272; 44 L. J. P. C. 52; 1 Cart. 95) too broadly. The bonus there authorized was payable, not to the Maine railway, but to the New Brunswick company, whose power was limited to the construction of a railway to the provincial boundary line.

[4] Clark v. Union Fire Ins. Co., 10 P. R. 313 (Ont.). On appeal the constitutional point was not touched: 6 O. R. 223. In the 1st ed. of this book, this decision was cited as above, with this comment added: "*Sed quære.* No doubt it can validly so contract in matters collateral to the objects for which it was incorporated, but (apart from the view which might be taken in foreign courts if such contract were sued upon there) it is submitted that, in respect of such insurance contracts, the company must be treated by the courts of these provinces as an unincorporated association of individuals." If the strict test of territoriality is to be applied in determining the corporate capacity of a provincial company, it seems difficult to escape from the position indicated. The conferring of corporate capacity—in other words, the creation of a legal person with a defined range of objects in reference to which such legal person can act—must be distinguished from the conferring of power. Where the objects defined have relation to subjects of provincial competence, the power may perhaps follow by implication; but where the objects (though territorially provincial) have relation to subjects of Dominion competence, the power must be sought from the parliament of Canada: Toronto v. Bell Tel. Co., 3 O. L. R. 465; McCaffrey v. Hall, 35 L. C. Jur. 38; McDougall v. Union Nav. Co., 21 L. C. Jur. 63; 2 Cart. 228; Shoolbred v. Clarke, 17 S. C. R. 265; 4 Cart. 459. As to powers by implication, the converse of the case put above recently came before Britton, J., in *Re* Ont. Power Co., O. L. R. noted *ante*, p. 277.

leading case[5] as to the scope of this class it was 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.

"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 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'

[5] Parsons' Case, 7 App. Cas. 96; 51 L. J. P. C. 11; 1 Cart. 265.

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,[6] the two branches together being treated as inclusive of the whole field; and the committee, in holding that the same wide meaning must be given to the term "property and civil rights" in the B. N. A. 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 what may be called political rights,[7] as between the subject, on the one hand, and the provincial government and bodies organized for the 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 to the territorial limitation indicated by the words "in the province,"[8] and subject also, as the cases show, to be cut down

[6] See *ante*, p. 47. The Act is printed in Houston, "Const. Doc. of Canada," 90.

[7] See *Re* N. Perth, 21 O. R. 538; *ante*, p. 124. Boyd, C., says of this class No. 13 that "it regards mainly the *meum* and *tuum* as between citizens."

[8] In *Re* Goodhue, 19 Grant. 366; 1 Cart. 560, it was held by some of the judges that a provincial statute cannot prejudicially affect the rights of a person living out of the province in respect to personal property within. If, however, this is to be taken as more than a decision as to the proper interpretation to be given to the language of the provincial Act there in question, it is difficult to agree with it. Although it is a rule of private international law, admitted into the jurisprudence of many modern states, that the law of the domicile governs as to personal property, it is only so in the absence of express legislation in the country in which it is sought to be enforced; and, viewing the matter as a question of power, it seems that provincial legislation altering the law in this respect would fall within this class No. 13 of s. 92. The question is certainly one of considerable difficulty, but there is a clear distinction between rights arising from contract abroad irrespective altogether of the locality of the property covered by the contract, and rights to be enjoyed by foreigners in respect to property situate in the province. There is no doubt a well recognized distinction between land and movables, but a reference to Von Savigny and other writers on private international law will show that the rule is not by any means universal; and that, in the jurisprudence of many modern states, the *lex loci* governs as well in reference to movables as to land and other immovable property. See Jones v. Can. Cent., 46 U. C. Q. B. 250, (noted *ante*, p. 267), for some remarks upon *Re* Goodhue. See also the notes to No. 2 of s. 92 "direct taxation *within the province*, etc.," *ante*, p. 256, *et seq.*; also *ante*, p. 62, as to extra-territorial legislation; also *Lefroy*, 757, *et seq.*

to the extent necessary to give proper play to the powers of the Dominion parliament under the various classes of section 91.[9]

Legislation by the parliament of Canada under some of the classes of section 91 necessarily deals with certain kinds of property and civil rights.[10] In other cases some modification of the rights of property and of civil rights is "necessarily incidental"[1] or ancillary to the main object of a federal Act.[2] In the former class of cases provincial legislation is incompetent,[3] in the latter it is *intra vires* in the absence of federal legislation.[4]

[9] This general proposition is discussed, *ante*, p. 183 *et seq.* It would seem, therefore, as if 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, (1894), A. C. 189; 63 L. J. P. C. 59; 5 Cart. 266; *ante*, p. 221, will no doubt be largely covered by any Insolvency Act the federal parliament may see fit to pass.

[10] *E.g.*:—Insolvency legislation: see notes to No. 21 of s. 91;
Banking law: see notes to No. 15 of s. 91:
Fisheries regulations: see notes to No. 12 of s. 91;
Patent law: see notes to No. 22 of s. 91;
Copyright law: see notes to No. 23 of s. 91;
Shipping Acts: see notes to No. 10 of s. 91;
Alien Acts: see notes to No. 25 of s. 91.

[1] See extract from the Local Prohibition Case, *ante*, p. 176.

[2] As previously intimated (*ante*, p. 189) it is difficult to determine in every case what is of the essence of a particular kind of legislation and what is necessarily incidental or ancillary thereto. The cases as to federal railway legislation (see *ante*, p. 268 *et seq.*), and the Voluntary Assignments Case, *ubi supra*, seem to point the distinction most clearly. See also Doyle v. Bell, 11 O. A. R. 326; 3 Cart. 297 (election law; noted *ante*, p. 123); Flick v. Brisbin, 26 O. R. 423, and Wilson v. Codyre, 26 N. B. 516 (criminal law: noted *ante*, p. 246); and the notes to the various classes of s. 91, mentioned in note 10 above.

[3] That is to say, a provincial legislature cannot pass an Insolvency Act, a Patent or Copyright Act, or enact fisheries regulations, etc. See *ante*, p. 186.

[4] See *ante*, p. 186. Can a provincial legislature pass an Act to cure defects in title arising from the failure to observe the provisions of federal law, for example, in insolvency cases? See Quirt v. Reg., 19 S. C. R. at p. 517, *per* Patterson, J.; 17 O. A. R. at p. 443, *per* Osler, J.A.; *Lefroy*, 390, 569-70.

In this connection, too, the true nature and character, the "pith and substance,"[5] 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,[6] to create offences with a view to their punishment in the public interest,[7] to regulate the structural arrangement of railways;[8] in other words, that the primary object dealt with is some matter falling within federal jurisdiction. In all such cases, provincial legislation would be held invalid.

In the following cases, provincial legislation has been upheld as relating to "property and civil rights:"—

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;[9] nor, when penalties are attached to a breach of the law, to be "criminal law" legislation.[10]

[5] The phase used by the Privy Council in Union Colliery Co. v. Bryden, (1899) A. C. 580; 68 L. J. P. C. 118.

[6] Union Colliery Co.'s Case, *ubi supra*, with which compare *Re* Tomey Homma, both noted *ante*, p. 280, *et seq.*

[7] See Russell v. Reg., Reg. v. Wason, Reg. v. Stone, Lord's Day Case, etc., noted *ante*, p. 240, *et seq.*

[8] See *ante*, p. 270, *et seq.*

[9] Parsons' Case (insurance contracts): see notes to No. 2 of s. 91, *ante*, p. 200; Beard v. Steele (warehouse receipts: 34 U. C. Q. B. 43; 1 Cart. 683; *ante*, p. 205; Reg. v. Robertson (game laws): 3 Man. L. R. 613; *ante*, p. 238; Gower v. Joyner (master and servant): 32 Can. Law Jour. 492; Reg. v. Wason (contracts with cheese factories), 17 O. A. R. 221; 4 Cart. 578; *ante*, p. 240.

[10] Reg. v. Wason, Reg. v. Robertson, Gower v. Joyner; all *ubi supra*. As put by Osler, J.A., in Reg. v. Wason: "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 hence, in a very wide sense, with property and civil rights. But while in this sense, and in making provisions

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. (*h*)

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. (*h*)

"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,[1] nor to fall within the domain of criminal law even when imprisonment might be awarded in certain events.[2]

Legislation as to proprietary rights, provincial or private, in fisheries;[3] as to Dominion companies and corporations[4] and federal railways;[5] and as to aliens.[6]

(*h*) Mr. Justice Street says,[7] referring to the language of class No. 14:

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 s. 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."

[1] Voluntary Assignments Case and cases noted under No. 21 of s. 91, *ante*, p. 221.

[2] *Ex p.* Ellis, and other cases noted under No. 27 of s. 91: *ante*, p. 246.

[3] See the extract from the Fisheries Case, *ante*, p. 213.

[4] See *ante*, p. 281.

[5] See *ante*, p. 272.

[6] See *ante*, p. 229. The notes to the various classes of 91 will doubtless disclose many other cases in which provincial legislation has been upheld as falling within this class.

[7] Reg. v. Bush, 15 O. R. 398; 4 Cart. 690: compare the language of McCreight, J., in *Re* Small Debts Courts, 95 B. C. at p. 254.

"Now, these words, standing alone and without any interpretation or context, appear to me 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[8] 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." . . .

"These 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."

Apart, therefore, from the establishment of courts it devolves upon the provincial governments to provide for the administration of justice under Dominion laws as well as provincial.[9] Legislation looking to the due enforcement in this sense of federal law is within the competence of provincial legislatures, in so far as the federal law does not itself properly cover the ground. For example:

A provincial legislature is within its powers in appointing officers to see to the proper observance of the Canada

[8] Sections 96 and 100 provide for the appointment and payment of certain judges by the Dominion government; s. 101 for the establishment by the parliament of Canada of the Supreme Court of Canada and of additional courts "for the better administration of the laws of Canada." See *post*.

[9] Reg. v. Bush, *ubi supra*.

Temperance Act and in making provision for their payment by local municipalities.[10]

A Quebec Act looking to the restraint of abuses in connection with the sale of liquor for medicinal purposes under the Canada Temperance Act, was held *intra vires*.[1]

In a number of cases the question as to the position in this connection of a provincial Attorney-General has been discussed. That 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.[2]

In Ontario, the late Master in Chambers (Mr. Dalton, Q.C.) held in 1871[3] 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 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

[10] License Commrs. v. Prince Edward, (1879) 26 Grant 452 (Spragge, C.); License Commrs. v. Frontenac, (1887) 14 O. R. 741 (Boyd, C.). In the latter case the judgment is based upon Nos. 4, 8, and 16 of s. 92; and in the first edition of this book (pp. 436) some doubt was expressed as to the correctness of these cases. Further consideration has led to the adoption of the view that the impugned Acts were valid under this class No. 14 of s. 92. A similar Act was upheld by the Supreme Court of New Brunswick in 1891; *Ex p.* Whalen, 30 N. B. 586.

[1] Matthieu v. Wentworth, (1895) Q. O. L. R. 4 Q. B. 343 (Archibald, J.). This agrees with the view expressed by Lord Herschell upon the argument of the Local Prohibition Case (see extract in Lefroy, p. 507), that a provincial legislature may, as a local and private matter, implement Dominion legislation so as to make it locally more stringent. The judgment of the P. C. in that case, however, (1896) A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295, does not embody any such view, simply holding that where the C. T. Act might be brought into force the provincial local option law would be superseded.

[2] 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*.

[3] Reg. v. Pattee, 5 P. R. (Ont.), 292; 3 Cart. 346 (n).

such proceedings; they can be legally taken only by the Attorney-General for Canada.[4]

In reference to proceedings against a company incorporated under Dominion law for breach of its charter or for acts beyond its powers the cases leave the question in some doubt. In an early case[5] 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, 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[6] it was held by the Court of Appeal, 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

[4] Mousseau v. Bate, (1883) 27 L. C. Jur. 153; 3 Cart. 341. 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.

[5] Atty.-Genl. (Ont.) v. Niagara Falls International Bridge Co. (1873) 20 Grant 34; 1 Cart. 813.

[6] 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.

counsel, that the provincial Attorney-General was not the proper plaintiff.[7]

In a somewhat similar proceeding against a Dominion company by the Attorney-General of Canada it was held by the Supreme Court of Canada[8] 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 recent 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.[9]

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."[10]

[7] Col. Bldg. Assn. v. Atty.-Genl. (Que.), (1884) 9 App. Cas. 157; 53 L. J. P. C. 27; 2 Cart. 275; 3 Cart. 118.

[8] Dominion Salvage and Wrecking Co. v. Atty.-Gen. (Can.), 21 S. C. R. 72.

[9] Atty.-Genl. (B.C.) v. The V. V. & E. Ry. Co., 9 B. C. 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.

[10] Monk v. Ouimet, (1874) 19 L. C. Jur. 71. See also *per* Taschereau, J., at p. 83.

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.

(1) *The constitution, maintenance and organization of courts* :

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 in the hands of these provincial courts. Section 129 of the B. N. A. 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 nevertheless. . . . to be repealed, abolished, or 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." It was evidently intended that in the main the administration of justice throughout Canada should be through the medium of these provincial courts, thus continued.[1] 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 are subject to removal only "on address of the Senate and House of Commons."[2] And for certain, perhaps obvious, reasons the parliament of Canada was empowered to establish a general court of appeal for Canada and "any additional courts for the better administration of the laws of Canada."[3]

[1] Ritchie, C.J., in Valin v. Langlois, 3 S. C. R. at p. 22; 1 Cart. 177.

[2] Sections 96-100: see *post*.

[3] Section 101.

The phraseology of this last clause is a clear recognition of the fact that the provincial courts would necessarily be called upon to administer the laws of Canada[4] (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[5] and to the reserve power to create additional courts[6] as above indicated, the right to regulate and provide for the whole machinery, including the appointment of all the judges and officers requisite for the proper administration of justice in its widest sense, is with the provincial legislatures.[7]

The right of the provincial legislatures to create new[8]

[4] See Quebec Resolutions, Nos. 31 and 32, in Appendix.

[5] See *post*, p. 301.

[6] See *post*, p. 302.

[7] Reg. v. Bush, 15 O. R. 398; 4 Cart. 690; Reg. v. Levinger, 22 O. R. 690. See extracts from the judgment of Street, J., *ante*, p. See also *Re* Small Debts Courts, 5 B. C. 246, *per* Walkem, J., at p. 260:—"Where, therefore, the legislature constitutes a court, 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." See, however, Scott v. Scott, 4 B. C. 316, noted *ante*, p. 235.

[8] Nova Scotia has, since Confederation, established a County Court system: see Johnston v. Poyntz, 2 R. & G. 193; 2 Cart. 416; Crowe v. McCurdy, 18 N. S. 301; both cases are referred to on the question of jurisdiction (*post*, p. 305), but in neither was the right of the provincial assembly to establish these courts questioned. As to the County Court system of British Columbia: see *Re* County Courts of B. C., 21 S. C. R. 446; 5 Cart. 490. As to Small Debts Courts: 5 B. C. 246. Manitoba, of course, had to organize her judicial system in its entirety.

The exercise of this power by the provinces has been viewed with great jealousy: see the report of Sir John Thompson, Minister of Justice, upon the disallowance of an Act of the Quebec assembly respecting District Magistrates' Courts, (1888), printed in full in Lefroy, p. 141, *et seq.* 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 *Lefroy*, p. 168.

courts and to appoint the judges[9] who shall preside over them has been affirmed in a number of cases. In an early case the Privy Council held to be *intra vires* a Quebec Act creating Fire Marshals' Courts;[10] and the establishment in that province of District Magistrates' Courts, including the appointment of the presiding officers, was held to be within the power of the assembly by the Quebec Court of Queen's Bench.[1]

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]

[9] The cases on this part of the subject have been complicated by the introduction of the question as to the prerogative rights 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 cannot arise at all: see notes to s. 9, *ante*, p. 89 *et seq.*

[10] Reg. v. Coote, (1873), L. R. 4 P. C. 599; 42 L. J. P. C. 45; 1 Cart. 57; and see *Ex p.* Dixon, 2 Rev. Crit. 231, cited by Sir John Thompson in his report referred to in the next note.

[1] Reg. v. Horner, (1876) 2 Steph Dig. 450; 2 Cart. 317. In this case Ramsay, J., speaks of Reg. v. Coote (*supra*) 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. Sir John Thompson strongly criticizes this passage in the report above referred to (see note p. 296). 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 Marshall'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 is referred to in the note on p. 296 *ante*, and seems equally unsatisfactory. Reg. 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. 305.

[2] Ganong v. Bayley, (1877) 1 P. & B. 324; 2 Cart. 509. 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 legislative competence of such legislature, is

The power of the provincial legislatures and the provincial executive in reference to the appointment of justices of the peace and police magistrates has been often upheld.[3] As remarked by Armour, C.J., "the appointment of justices of the peace is a primary requisite to the administration of justice."[4]

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.[5]

The following cases, relating to the assignment of certain classes of litigation to particular judicial officers of the

a proper exercise of its legislative power. 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 B. N. A. Act, vested exclusively in the Governor-General as Her Majesty's only representative in Canada. But in view of the later authorities this view is untenable. See notes to s. 9, *ante*, p. 89, *et seq.*

[3]Reg. v. Reno, (1868) 4 P. R. (Ont.) 281; 1 Cart. 810 (Draper, C.J.); Reg. v. Bennett, (1882) 1 O. R. 445; 2 Cart. 634 (Q.B.); Richardson v. Ransom, (1886) 10 Ont. R. 387; 4 Cart. 630 (Wilson, C.J.); Reg. v. Bush, (1888), 15 O. R. 398; 4 Cart. 690 (Q.B.); *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 N. B. 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. 309. See also Gower v. Joyner, 2 N. W. Terr. Rep. 43.

[4] Reg. v. Bush, *supra.*

[5] Wilson v. McGuire, (1883) 2 O. R. 118; 2 Cart. 665. 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 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. In Gibson v. McDonald, 7 O. R. 401; 3 Cart. 319, 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; 5 Cart. 490. These cases, however, deal rather with the question of the territorial jurisdiction of County Courts, discussed later; see *post*, p. 305.

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 was upheld by MacMahon, J.,[6] and in Quebec a provincial Act limiting the right of appeal in such cases was held valid.[7] Similarly, Armour, C.J., has 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.[8]

It is often difficult to draw a clear line between the "constitution" or "organization"[9] of a court and "procedure."[10] 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,[1] while the courts are organized under provincial law.

Difficulties have particularly arisen in reference to trial by jury. The Criminal Code, 1892, adopts provincial laws as to the selection of jurors.[2] In an early case[3] 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

[6] Reg. *ex rel.* McGuire v. Birkett. (1891) 21 O. R. 162.

[7] Clarke v. Jacques, Q. R. 9 Q. B. 238. In Valin v. Langlois, 5 App. Cas. 115; 49 L. J. P. C. 37; 1 Cart. 158, the Privy Council doubted whether election trials fall within "the administration of justice" and these cases, therefore, have been already noted under "municipal institutions" (No. 8 of s. 92, *ante*, p. 265).

[8] *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). See *ante*, p. 279.

[9] The "maintenance" of courts, in the financial aspect, has been already dealt with under No. 2 of s. 92, "direct taxation within the province for provincial purposes": *ante*, p. 257.

[10] *Per* Ritchie, J., in Reg. v. Cox, *infra*.

[1] No. 27 of s. 91.

[2] Section 662. The parliament of Canada may validly so enact: Reg. v. O'Rourke, 32 U. C. C. P. 388; 1 O. R. 465; 2 Cart. 644; Reg. v. Provost, 29 L. C. Jur. 253. See also Reg. v. Plante, 7 Man. L. R. 537.

[3] Reg. v. Bradshaw, 38 U. C. Q. B. 564; 2 Cart. 602; and see Reg. v. Plante, *ubi supra*.

courts; while a jury empanelled and sworn is part of the organization of the court.[4] And, on the 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;[5] but this decision must be taken to be overruled by the subsequent decision of a Divisional Court[6] upholding the same Act in so far as it conferred like jurisdiction upon the Court of General Sessions.

The Supreme Court of Nova Scotia has recently 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. The former is matter of organization, the latter of criminal procedure.[7] The provision in the Criminal Code that on appeals from summary convictions the appellate court shall try the appeal without a jury is *intra vires* as relating to procedure and not to the organization of the court.[8]

Limitations upon provincial power:

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

[4] Reg. v. Plante, *ubi supra*.

[5] Reg. v. Toland, 22 O. R. 505. See *Re* Boucher, quoted in that case.

[6] Reg. v. Levinger, 22 O. R. 690: Armour, C.J., and Street and Falconbridge, JJ. See *post*, p. 305, for an extract from the judgment. It should be noted, however, that express reference is made to the fact that the impugned Act does 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 Reg. v. Toland and Reg. v. Levinger be distinguished: but the question as to trial by jury does not appear in Reg. v. Toland, the judgment being based upon the ground indicated in the text.

[7] Reg. v. Cox, (1898) 31 N. S. 311.

[8] Reg. 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.

of the Superior, County, and District Courts,[9] and (2) the possible establishment by the parliament of Canada of "additional courts for the better administration of the laws of Canada," under section 101. Of these in their order.

(a) *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:[10]

"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;[1] and this and the other limitations provided in sections 97 and 98 as to the area of choice are as much beyond power of alteration by the parliament of Canada as by a provincial legislature. 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.[2]

[9] The utter absence of logical method in thus divorcing legislative and executive functions is not matter for discussion in this book: see 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 give the Dominion some voice in connection with the constitution of the courts which would necessarily have to enforce Dominion laws.

[10] Liquidator of Mar. Bank v. Rec.-Gen. of N. B., (1892) A. C. 437; 61 L. J. P. C. 75; 5 Cart. 1. See also the cases as to the distinction between legislative power and proprietary rights: *ante*, p. 162.

[1] Compare s. 59 and s. 99.

[2] *Re* Squier, 46 U. C. Q. B. 474; 1 Cart. 789. 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

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.[3] Dominion ministers of justice have refused to be bound by such legislation,[4] but there is no judicial decision on the point.

(*b*) *Dominion Courts*:

General Court of Appeal, etc.

"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."[4a]

Under this section have been established the Supreme Court of Canada,[5] the Exchequer Court of Canada,[6] Maritime

(old) Canada for 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. Such ground would equally affirm the invalidity of the original Act; and 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. See also Lefroy, p. 128 (n1).

[3] The question, it is submitted, is not between Dominion and provincial legislation; it is a question of repugnancy to an Imperial statute, the B. N. A. Act. See *ante*, p. 27, *et seq.* 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. See the judgment of O'Connor, J., in Gibson v. McDonald, 7 O. R. 401; 3 Cart. 319. If such legislation is not repugnant to the B. N. A. Act, it would seem to fall clearly within No. 14 of s. 92.

[4] See Report of Sir John Thompson, (1888), referred to in the note on p. 296, *ante*: Lefroy pp. 150-1, 159, 160, 161, 165.

[4a] The question as to the jurisdiction of these "additional courts," and whether that jurisdiction is exclusive, as discussed *post*, p. 306 *et seq.* Here the only matter dealt with is the extent to which the exercise of the power conferred by this section may interfere with the operation of provincial courts.

[5] Established by 38 Vic. c. 11 (Dom.). It became a court on January 11, 1876; see Reg. v. Taylor, 1 S. C. R. 65.

[6] See 38 Vic. c. 11 (Dom.), 1875.

Courts,[7] Revising Officers' Courts,[8] the Railway Committee of the Privy Council[9] (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";[10] and there are doubtless other instances in which judicial powers have been conferred upon Dominion officials.[1]

The power, it will be noticed, is introduced by a *non-obstante* clause, "notwithstanding anything in this Act," so that the legislation 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.[2]

In reference to Revising Officers' Courts for the settlement of voters' lists for Dominion elections it was held by the Chancery Division in Ontario[3] that the provincial Superior Courts cannot interfere by prohibition with the working of such federal courts.

"The Chancery Division has, in common with the other divisions of the High Court of Justice, plenary jurisdiction

[7] See "The Picton," 4 S. C. R. 648; 1 Cart. 557.

[8] See *Re* North Perth, 21 O. R. 538.

[9] See *Re* C. P. R. and York, 27 O. R. 559; 25 O. A. R. 65 (1896-8).

[10] See *Re* Bell Tel. Co., 7 O. R. 605; 4 Cart. 618.

[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., 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; 4 Cart. 630.

[2] Local Prohibition Case, (1896) A. C. 348, at p. 366; 5 Cart. 295, at p. 316; 65 L. J. P. C. 26.

[3] *Re* North Perth, 21 O. R. 538, overruling *Re* Simmons and Dalton, 12 O. R. 505. Reference is made to the peculiar nature of the jurisdiction conferred upon the courts in election matters: see Valin v. Langlois, 5 App. Cas. 115; 49 L. J. P. C. 68; 1 Cart. 158; Theberge v. Landry, 2 App. Cas. 102; 46 L. J. P. C. 1; 2 Cart. 1; and in that particular class of cases interference by the ordinary courts would be impliedly excluded; *per* Meredith, J., at p. 546. The language of Boyd, C., however, (above quoted) would exclude jurisdiction to prohibit any federal court; contrary to the view expressed in other cases noted in the text. See also McLeod v. Noble, (1897) 28 O. R. 528.

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 B. N. A. Act.*"—Per Boyd, C.

On the other hand, 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.[4] 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.[5] No intimation that prohibition would not lie if the jurisdiction were wanting appears in the judgments.

As intimated by the Privy Council,[6] 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 vitally connected, therefore, with the question of the jurisdiction of courts dealt with later.[7]

(2) *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

[4] *Re* Bell Tel. Co., 7 O. R. 605; 4 Cart. 618. See also 9 O. R. 339. And the court will enquire into the validity of orders pronounced by the Railway Committee of the Privy Council and will not enforce them if *ultra vires: Re* C. P. R. and York, 27 O. R. 559; 25 O. A. R. 65.

[5] Atty.-Gen. (Can.) v. Flint, 16 S. C. R. 707; 3 R. & G. 453; 4 Cart. 288.

[6] Valin v. Langlois, 5 App. Cas. 115; 49 L. J. P. C. 68; 1 Cart. 158.

[7] See *post*, p. 305 *et seq.*

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[8] whose jurisdiction was limited as to the class of matters which might be entertained by them, without territorial limitation,[9] or was subject to limitations along both lines.[10] It is almost unnecessary to say, there was no limitation of jurisdiction in any 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 the provincial legislative assemblies respectively.

The jurisdiction of provincial courts is necessarily limited territorially by the provincial boundary lines.[1] Within those boundaries the provincial legislatures may confer such jurisdiction, territorial and as to subject matter, civil or criminal, as they may respectively deem proper,[2] subject always to the

[8] See *per* Wilson, J., in Ganong v. Bayley, 1 P. & B. at p. 326; 2 Cart. at p. 512.

[9] *E.g.*, County Courts in Upper Canada.

[10] *E.g.*, Division Courts.

[1] Great N. W. Cent. v. Charlebois, (1899) A. C. 114; 68 L. J. P. C. 25; Gray v. Man. & N. W., (1897) A. C. 254; 66 L. J. P. C. 66; Deacon v. Chadwick, 1 O. L. R. 346. But see Baxter v. Cent. Bank, 20 O. R. 214.

[2] Reg. v. Levinger (1892), 22 O. R. 690: "A court is a place where justice is judicially administered: Coke v. Littleton, 58a; and the constitution of a court therefore necessarily includes its jurisdiction; and the granting by the B. N. A. Act to the provincial legislatures of the power to constitute courts of civil and criminal jurisdiction necessarily included the power of giving jurisdiction to those courts, and impliedly included the power of enlarging, altering, amending and diminishing the jurisdiction of those courts."—*per* Armour, C.J. *Re* County Courts of B. C., (1892) 21 S. C. R. 446; 5 Cart. 490: "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."—*per* Strong, J. Crowe v. McCurdy, 18 N. S. 301: "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."—*per* Thompson, J. And see Guay v. Blanchet, 5 Que. L. R. 43, at p. 51, *per* Casault, J.

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 B. N. A. Act.[3]

On the other hand the jurisdiction of Dominion courts established under the authority of the latter part of section 101,[4] while it may or may not[5] territorially embrace the whole of Canada, is necessarily limited as to subject matter. These "additional" courts are for "the better administration of the laws of Canada," that is to say, federal laws.[6] Incidentally, it may of course happen that the law to be applied in determining a case in a Dominion court is the law laid down in provincial enactment.[7]

[3] See *post*.

[4] See *ante*, p. 302.

[5] The Picton, 4 S. C. R. 648; 1 Cart. 557.

[6] See Lefroy, 515 (n. 1). The appellate jurisdiction of the Supreme Court of Canada is, of course, subject to no such limitation. See L. Assn. de St. J. B. v. Brault, (1901) 31 S. C. R. 172.

[7] 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 "legal relations." (see *ante*, p. 183), 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 *primâ facie* case.

The Dominion parliament legislating upon matters falling within its competence, may confer jurisdiction upon a provincial 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, seems to be considered by the Privy Council a matter of indifference.[8] 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.[9] 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 Im-

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. 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. See Redpath v. Allen (*The Hibernian*), L. R. 4 P. C. 511; 42 L. J. Adm. 8, referred to *ante*, p. 68.

[8] Valin v. Langlois, 5 App. Cas. 115; 49 L. J. P. C. 37; 1 Cart. 158. See *ante*, p. 304. In this case jurisdiction to try controverted (Dominion) election petitions was conferred by the parliament of Canada upon the provincial Superior Courts. See notes to s. 41, *ante*, p. 127.

[9] Atty.-Genl. (Can.) v. Flint, 16 S. C. R. 707; 4 Cart. 288; followed in Reg. 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 Rev. Act.

perial 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.[10] And, again, it was held by Stuart, J., 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.[1]

As instances of jurisdiction conferred upon provincial courts 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.[2]

"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 courts for the taking of evidence for use before foreign tribunals, has been affirmed by the courts of both Ontario and Quebec.[3]

[10] "Judges as citizens were bound to perform all the duties which are imposed upon them by either the Dominion or local legislature"—*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; 1 Cart. 231. See Lefroy, 511.

[1] The Farewell, 7 Q. L. R. 380; 2 Cart. 378.

[2] Valin v. Langlois, *ubi supra*, affirming the judgment of the Supreme Court of Canada, 3 S. C. R. 1. Ritchie, C.J., gives several instances of such legislation.

[3] *Re* Wetherell v. Jones, 4 O. R. 713; 3 Cart. 315; *Ex p.* Smith, 16 L. C. Jur. 140; 2 Cart. 330. These cases are also referred to *ante*, p. 182, as falling within the residuary opening clause of s. 91.

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 affirmed in a number of cases.[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 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.

By the exercise of its power under section 101 to establish additional courts, the Dominion parliament may take from provincial courts the cognizance of those matters within Dominion competence which it may think fit to assign to courts of its own creation,[6] or it may take them from one provincial

[4] *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); Reg. v. Wipper, (1901) 34 N. S. 202 (provincial J. P.); Reg. v. Bennett, 1 O. R. 445; 2 Cart. 634; Reg. v. Bush, 15 O. R. 398; 4 Cart. 690. 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; 5 Cart. at p. 496:—"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, it is submitted, properly explained in Reg. 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. See, also, Lefroy, 525 (n).

[5] *Re* Wilson v. McGuire, 2 O. R. 118; 2 Cart. 665, cited *ante*, p. 298; Crowe v. McCurdy, 18 N. S. 301, cited *ante*, p. 305. As to the appointment of County Court judges to act as local judges of the Superior Courts, and as referees, &c., see Lefroy, 524, where the view taken by Ministers of Justice is indicated.

[6] See Reg. v. Farwell, 22 S. C. R. 553: "The parliament of Canada had the right to enact that all actions, &c., in which the Crown

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 cannot be limited or abridged by provincial legislation.[7]

(3) PROCEDURE.

The result of the authorities may be shortly summarized:

(*a*) The parliament of Canada can alone legislate as to procedure in criminal matters,[8] i.e., proceedings to enforce the "criminal" law as that term in No. 27 of section 91 is properly to be interpreted.

(*b*) The parliament of Canada may also, when provision as to procedure is necessary to proper and comprehensive legislation upon any of the branches of jurisprudence wrapped up in the various classes of section 91, or is reasonably ancillary thereto, legislate to that extent as to procedure in civil matters.

(*c*) Subject to the last paragraph, jurisdiction to legislate as to procedure in all civil matters,[9] whether relating to sub-

in right of the Dominion is plaintiff or petitioner may be brought in the Exchequer Court."—head note. See also the judgment of Taschereau, J., in Valin v. Langlois, 3 S. C. R. at p. 74; 1 Cart. at p. 207. See, also, however, the judgment of Wilson, C.J., in Crombie v. Jackson (34 U. C. Q. B. at p. 579; 1 Cart. at p. 686), as stated in Lefroy, p. 441; and of Thompson, J., in Pineo v. Gavaza (18 N. S. at p. 489), as stated in Lefroy at p. 442.

[7] Clarkson v. Ryan, 17 S. C. R. 251; 4 Cart. 439; and see L'Assn. de St. J. B. v. Brault, 31 S. C. R. 172.

[8] As to what is "procedure" and what "organization," see *ante*, p. 299.

[9] In ss. 91 and 92 "matters" is used in two very different senses. "Civil matters" is but another way of saying civil actions, suits, or other judicial proceedings; while "matters over which, etc.," refers to subject matters for legislative action.

jects of Dominion or provincial competence, is with the provincial legislatures.

(*d*) *Pro hac vice* the enforcement of provincial penal laws is a *civil* matter.

(*a*) *Procedure in Criminal Matters*:

The enforcement of all Dominion penal law, whether embodied in the Criminal Code or in separate enactment, is procedure in criminal matters. It has been so held in several cases under the Canada Temperance Acts, provincial legislation as to procedure in such prosecutions being *ultra vires*.[10]

A Dominion Act, however, which provided that on the trial of cases under provincial liquor license Acts the defendant should be competent to give evidence, was held *ultra vires*.[1]

(*b*) *Dominion Legislation Regulating Procedure in Civil Matters*:

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.

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

[10] Reg. v. Prittie, 42 U. C. Q. B. 612; 2 Cart. 606; Reg. v. Lake, 43 U. C. Q. B. 515; 2 Cart. 616; Reg. v. Eli, 13 O. A. R. 526 (appeals); McDonald v. McGuish, (1883) 5 R. & G. 1 (appeals); Reg. v. Wolfe, (1886) 7 R. & G. 24 (appeals); Reg. v. De Coste, (1888) 21 N. S. 216 (removal by *certiorari*). In Russell v. Reg. (see extract *ante*, p. 171), the P. C. referred to the C. T. Act as having direct relation to the criminal law; but the Act as a whole is now grounded solely on the "peace, order and good government" clause of s. 91: see Local Prohibition Case, (1896) A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295.

[1] Reg. v. Bittle, 21 O. R. 605. On the other hand, it had previously been held that such a prosecution was for a "crime" within the meaning of the Ontario Act, which made the defendant a competent witness on the trial of any matter "not being a crime:" Reg. v. Hart, 20 O. R. 611; a prosecution under a city by-law forbidding wooden buildings within certain limits. See also Reg. v. Roddy, 41 U. C. Q. B. 291; 1 Cart. 709; Reg. v. Becker, 20 O. R. 676; Reg. v. Rowe, 12 C. L. T. 95; *Lefroy*, 464.

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. And so of divorce law, patent law, insolvency law, and election law;[2] and other branches of jurisprudence may perhaps be found to be wrapped up 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.[3]

(*c*) *Procedure in Civil Cases*:

This is clearly assigned to the provinces by this item No. 14. The admissibility of evidence is a question of procedure and, subject to what has just been stated, is to be determined by provincial law.[3a]

(*d*) *Provincial Penal Law*:

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.[4] The provisions of Dominion statutes regulating appeals from summary convictions do not apply to offences against provincial law; the provincial enactments alone

[2] The cases will be found collected in the notes to the various classes involving these topics.

[3] See *ante*, p. 183, where the general rule, of which the above kind of legislation furnishes many examples, is discussed.

[3a] McKilligan v. Machar, 3 Man. L. R. 418.

[4] Pope v. Griffith, 16 L. C. Jur. 169; 2 Cart. 291 (a proceeding under the Quebec License Act); *Ex parte* Duncan, *ib.*, 188, 297 (provincial Act taking away the right to *certiorari* to remove proceedings under Quebec License Act; Page v. Griffith, 17 L. C. Jur. 302; 2 Cart. 308; Coté v. Chavreau, 7 Q. L. R. 258; 2 Cart. 311; Reg. v. Robertson, 3 Man. L. R. 613 (proceedings under provincial game laws; see *ante*, p. 238); Reg. v. Wason, 17 O. A. R. 221; 4 Cart. 578; Reg. v. Ronan, 23 N. S. 421; Reg. v. Bittle, 21 O. R. 605 (competency of witnesses); Reg. *ex rel.* Brown v. Simpson Co., 28 O. R. 231 (appeal by case stated); Lecours v. Hurtubise, 2 Can. Crim. Cas. 521 (appeals).

16. Generally all matters of a merely local or private nature in the province. (*i*)

---

govern.[5] And a Dominion statute making the defendant a competent witness upon the trial of such cases has been held *ultra vires*.[6]

It has been suggested that provincial legislation under No. 15 of section 92 can only be special legislation applying to particular offences;[7] but the above authorities are all opposed to that view. The Supreme Court of Canada, without any hint of such a limitation, has upheld a general enactment by the Ontario legislature empowering the Lieutenant-Governor to remit fines, etc., imposed under provincial legislation.[8]

The power is conferred with perhaps somewhat too minute attention to details,[9] but it is a large general power of legislation[10] and is not to be treated as if the class enumeration were itself criminal legislation The punishment may be by fine or imprisonment or both;[1] the imprisonment may be with or without hard labor;[2] and the penalty imposed may be forfeiture of goods.[3] The fine, in whole or in parf, may go to private parties, informers or others.[4]

(*i*) In 1896, their Lordships of the Privy Council assigned this class to the position it must now be taken to

[5] *Ex parte* Duncan, Reg. v. Wason, Reg. *ex rel.* Brown v. Simpson Co., Lecours v. Hurtubise, all *ubi supra*.

[6] Reg. v. Bittle, 21 O. R. 605. See *ante*, p. 311.

[7] Reg. v. Boardman, 30 U. C. Q. B. 553: 1 Cart. 676: Tarte v. Beique, 6 Mont. L. R. 289.

[8] Pardoning Power Case, 23 S. C. R. 458: 5 Cart. 517.

[9] See Mr. Edward Blake's argument in Reg. v. Wason, *ubi supra*.

[10] Hodge v. Reg., 9 App. Cas. 117; 53 L. J. P. C. 1; 3 Cart. 144; Reg. v. Frawley, 7 O. A. R. 246; 2 Cart. 576; and cases noted *ante*, p. 69, *et seq.*

[1] 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.

[2] Hodge v. Reg., *ubi supra*. *Contra*, Blouin v. Quebec, 7 Q. L. R. 18; 2 Cart. 368.

[3] King v. Gardner, 25 N. S. 48.

[4] Bennett v. Pharm. Assn., 1 Dorion 336; 2 Cart. 250. But see *Ex p.* Armitage, 5 Can. Crim. Cas. 343.

occupy in the scheme of distribution effected by sections 91 and 92:

"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."[5]

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."[6]

The views expressed in the above case were carried to their logical conclusion in the *Manitoba Liquor Act case*,[7] 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

[5] Local Prohibition Case, (1896) A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295. See, also, as to the scope of this class, *ante*, p. 187.

[6] Then follows the passage relating to carrying firearms quoted *ante*, p. 245.

[7] (1902) A. C. 73; 71 L. J. P. C. 28.

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.;"[8] if simply subjected to regulation or prohibited under penalty the legislation is valid under this class No. 16.[9]

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.[10] In an early case[1] 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; 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.[2]

Other matters which have been held to fall within this class:[3]

An Act of the Quebec legislature, passed in aid of a society in financial straits, forcing commutation upon certain annuitants.[4]

[8] See notes to that class, *ante*, p. 266.

[9] These two aspects of the question cover all the cases on the subject of the liquor traffic. The recent pronouncement of the P. C. in the Man. Liquor Act Case, *ubi supra*, as to the present position of the question renders it unnecessary to refer to the long list of earlier cases upon it.

[10] See *ante*, p. 191.

[1] L'Union St. Jacques v. Belisle, L. R. 6 P. C. 31: 1 Cart. 63: referred to with approval in Dow v. Black, L. R. 6 P. C. 272: 44 L. J. P. C. 52: 1 Cart. 95.

[2] Local Prohibition Case, Man. Liquor Act Case, *ubi supra*. As to local legislation implementing federal: see note *ante*, p. 292, and Toronto v. Bell Tel. Co., passage quoted *ante*, p. 278.

[3] 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.

[4] L'Union St. Jacques v. Belisle, L. R. 6 P. C. 31: 1 Cart. 63. See also No. 21 of s. 91. As to "private bills" legislation, see *ante*, p. 165.

Education. (*j*)

Legislation respecting education.

93. In and for each province the legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

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.[5]

Provincial Acts respecting nuisances.[6]

Provincial game laws.[7]

A territorial ordinance relating to ferries.[8]

A provincial Act validating an agreement between a municipality and an electric light company.[9]

A provincial Sabbath observance law.[10]

(*j*) Upon the admission of Prince Edward Island[1] and British Columbia,[2] this section as it stands was, with other parts of the B. N. A. 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.[3] 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.[4] Although, therefore, it is thought advisable to treat the whole subject in this place, it will be equally advisable to consider the matter by provinces.

[5] Dow v. Black, *ubi supra*. See also No. 2 of s. 92.

[6] *Ex p.* Pillow, 27 L. C. Jur. 216; 3 Cart. 357. See also *ante*, p. 204.

[7] Reg. v. Robertson, 3 Man. L. R. 613: see No. 13 of s. 92, *ante*, p. 289.

[8] Dinner v. Humberstone, 26 S. C. R. 252: and see Cleveland v. Melbourne, 2 Cart. 241; 4 Leg. News, 277 (tollbridge case).

[9] Hull Elec. v. Ottawa Elec., (1902) A. C. 237; 71 L. J. P. C. 58. And see *ante*, p. 267, as to local works and undertakings.

[10] *Ex p.* Green, 35 N. B. 137; see *ante*, p. 239, and cf. Reg. v. Halifax Tram. Co., 30 N. S. 469, *ante*, p. 239. But see now the recent decision of the Privy Council in the Lord's Day Case (July, 1903).

[1] See *post*.

[2] See *post*.

[3] See *post*, p. 321.

[4] See *post*, p. 322.

(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;

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.[5] 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 the Roman Catholic minority of the Upper Province, but no Canadian legislation took place upon the subject, the end aimed at being secured by sub-section 2 of this section 93. It is applicable to only the one province of Quebec, and it puts the two provinces of Quebec and Ontario upon so much the same footing that one is justified in dealing with these two provinces 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.:[6]

"As Burns, J., remarked in Re Ridsdale & Brush:[7] '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

[5] 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 B. N. A. Act.

[6] Free v. McHugh, 24 U. C. C. P. at p. 20.

[7] 22 U. C. Q. B. 124.

(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

---

of it for the convenience of such separatists as availed themselves of the provisions in their favor;' and my brother Gwynne, commenting on these words in Harding v. Mayville,[8] 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,[9] they may be shortly stated as follows:

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. Any legislation of a compulsory character would, it is submitted, be unconstitutional as prejudicially affecting the right or privilege which such persons had by law at the date of Confederation.[10]

[8] 21 U. C. C. P. at p. 511.

[9] Winnipeg v. Barrett, (1892) A. C. 445; 61 L. J. P. C. 58; 5 Cart. 32; Brophy v. Atty.-Gen. (Man.), (1895) A. C. 202; 64 L. J. P. C. 70; 5 Cart. 156.

[10] See *post*, p. 322.

same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec;

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, does not *prejudicially* affect any right or privilege thereby protected.[1]

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:—

[1] Board v. Grainger, 25 Grant. 570; 1 Cart. 816; *per* Blake, V.C., who refers to s.-ss. 3 and 4 as indicative of the expectations of the framers of the B. N. A. 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 of an opinion (*In re* R. C. Sep. Schools, 18 O. R. 606; see also Trustees of R. C. Sep. School v. Arthur, 21 O. R. 60) 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. 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 many years experience, is found to be the best and simplest we have yet had."

(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 pro-

---

"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[2] 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."[3]

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 have 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 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.[4]

[2] Of the Manitoba Act, corresponding with s.-ss. 3 and 4 of s. 93 of the B. N. A. Act.

[3] Barrett's Case, *ubi supra*, re-affirmed in Brophy's Case, *ubi supra*.

[4] 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. For the political turmoil raised by this decision, see Dom. Sess. Pap., (1877), No. 89.

vince, 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.

Manitoba.

This province became part of the Dominion in 1870, and by what is popularly known as the Manitoba Act,[5] the power of the provincial legislature in reference to education is defined:

Legislation touching schools subject to certain provisions.

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 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 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:

Power reserved to Parliament.

(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 for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.

[5] 33 Vic. c. 3. Dom., see *post*.

(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

---

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.[6]

"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.*"

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

[6] Barrett's Case, (1892) A. C. 445; 61 L. J. P. C. 58; 5 Cart. 32. See also the statement in Brophy's Case, (1895) A. C. 202; 64 L. J. P. C. 70; 5 Cart. 156. As to the rule of interpretation applied in the earlier case; see *ante*, p. 71.

It is, perhaps, matter of doubt whether the rights and privileges enumerated in the judgment of the Privy Council in Barrett's Case (*ubi supra*), 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.

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

---

dignity,[7] the position of affairs there is as yet embryonic. In respect to educational matters, the powers of the Legislative Assembly are at present circumscribed, as will appear from the following section of the North-West Territories Act—R. S. C., c. 50:—

14. The Lieutenant-Governor in Council[8] shall pass all necessary ordinances in respect to education; but it shall therein always be provided that a majority of the ratepayers of any district or portion of the territories, or of any less portion or sub-division 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 valid 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

[7] See *post*.

[8] Now the Legislative Assembly. See *post*.

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.

Legislation for uniformity of laws in three Provinces.

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 par-

---

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.[9]

[9] The whole question is exhaustively discussed in Brophy's Case. *ubi supra.*

liament 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. Concurrent powers of legislation respecting Agriculture, etc.

VII. JUDICATURE. (*k*)

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. Appointment of Judges.

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. Selection of Judges in Ontario, etc.

98. The judges of the courts of Quebec shall be selected from the bar of that province. Selection of Judges in Quebec.

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. Tenure of office of Judges of Superior Courts.

(*k*) This part of the Act will be found fully discussed in the notes to No. 14 of section 92.

Salaries, etc., of Judges.

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.

General Court of Appeal, etc.

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. (*l*)

Creation of Consolidated Revenue Fund

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

---

(*l*) Speaking of the legislative jurisdiction conferred by sections 91 and 92 of the B. N. A. Act, 1867, the Privy Council has laid down the general rule that "whatever is not thereby given to the provincial legislatures rests with the parliament of Canada.[1] As to proprietary rights the rule is reversed.

"Whatever proprietary rights were at the time of the passing of the B. N. A. Act possessed by the provinces remain vested in them, except such as are by any of its express enactments transferred to the Dominion of Canada."[2]

Legislative jurisdiction and proprietary rights:

"There is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction

[1] Lambe's Case, 12 App. Cas. 575; 56 L. J. P. C. 87: 4 Cart. 7. See *ante*, p. 174.

[2] Fisheries Case, (1898) A. C. 700; 67 L. J. P. C. 90.

respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred on them by this Act, (*m*) 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.

---

in respect of a particular subject matter is conferred on the Dominion legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion government proprietary rights were transferred to it." [3]

(*m*) What the Privy Council has said in reference to Ontario applies to all the provinces:

"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, 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 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 provinces 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

[3] Fisheries Case, *ubi supra*. See *ante*, p. 163, where the cases are collected in which the distinction has been acted upon.

Expenses of collection, etc.

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.

Interest of Provincial public debts.

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.

Salary of Governor-General.

105. Unless altered by the parliament of Canada, the salary of the Governor-General shall be ten thousand pounds stirling 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.

Appropriation from time to time.

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.

---

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.*"[4]

[4] St. Catherines Milling Co. v. Reg., 14 App. Cas. 96; 58 L. J. P. C. 59; 4 Cart. 107. The scheme of division of assets, &c., effected by this Part VIII., has been exhaustively discussed by the P. C. in Mercer's Case, 8 App. Cas. 767; 52 L. J. P. C. 84; 3 Cart. 1; and the St. Catherines 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 14, *et seq.*

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. Transfer of stocks, etc.

108. The public works and property of each province, enumerated in the third schedule to this Act, shall be the property of Canada. Transfer of property in schedule.

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 harbors. (*n*)

(*n*) "With regard to public harbors, 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 'harbor' 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),[5] where it was held that the foreshore between high and low water mark on the margin of the water became the property of the Dominion as part of the harbor.

"Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question, what falls within the description 'public harbor.' They must decline to attempt an exhaustive definition of the term,

[5] 6 S. C. R. 707; 2 Cart. 147.

3. Lighthouses and piers, and Sable Island.

4. Steamboats, dredges, and public vessels.

---

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 harbor, what forms a part of that harbor. 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 harbor 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 harbor is Crown property it necessarily forms part of the harbor. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbor purposes, such as anchoring ships or landing goods, it would no doubt form part of the harbor; but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not."[6]

The harbor of St. John, N. B., has been held not to be a "public harbor" within this section, 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-

[6] Fisheries Case, (1898) A. C. 700; 67 L. J. P. C. 90. See also 26 S. C. R. 444. In Samson v. Reg., (1888) 2 Ex. Ct. R. 30, it was held 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. Other cases in which the question, What is a public harbor? has been discussed are Nash v. Newton, 30 N. B. 610; Lake Simcoe Ice Co. v. McDonald, 29 O. R. 247; 26 O. A. R. 411; 31 S. C. R. 130; Fader v. Smith, 18 N. S. 433; Sidney, &c., Coal Co. v. Sword, 23 N. S. 214; 21 S. C. R. 152; Atty.-Gen. v. Keefer, 1 B. C. (pt. 2) 368.

5. Rivers and lake improvements. (*o*)
6. Railways and railway stocks, mortgages, and other debts due by railway companies. (*r*)
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.

---

vincial Act, creates no such obstruction, an injunction will be refused.[7]

(*o*) It is now definitely settled that river improvements and not the rivers themselves vest in the Dominion.[8] Consequently, the soil of the river bed of the Ottawa river is vested in the provinces of Quebec and Ontario, each *ad medium filae*.[9]

(*p*) 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. It was a *quaere* with the committee whether the parliament of Canada could afterwards legislate in derogation of claims

[7] St. John's Gas Light Co. v. Reg., 4 Ex. Ct. R. 326. In the Court of Appeal for Ontario in Lake Simcoe Ice Co. v. McDonald, *ubi supra*, Burton, C.J.O., expresses the opinion that the term "public harbor" is not restricted to those harbors which at the time of Confederation had been "artificially constructed or improved at public expense," and instances Halifax Harbor. In that case a small bay in Lake Simcoe at which there was a wharf permissively used, but no mooring ground, and little shelter except from an offshore wind, was held by the Court of Appeal not a "public harbor." 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, &c." included the right to cut a channel through the ice in order to float into shore ice cut farther out in the bay. This was apparently the view of MacMahon, J., at the trial.

[8] Fisheries Case, (1898) A. C. 700; 67 L. J. P. C. 90. See *ante*, p. 72.

[9] Hurdman v. Thompson, Q. L. R. 4 Q. B. 409.

9. Property transferred by the Imperial government, and known as ordnance property. (*q*)

10. Armouries, drill sheds, military clothing, and munitions of war, and lands set apart for general public purposes. (*r*)

Property in land, mines, etc.

109. All lands, (*s*) mines, minerals, and royalties (*t*) belonging to the several provinces of Canada, Nova Scotia and

---

against, or obligations incurred by, the province in respect of such railways.[10]

(*q*) "*Ordnance property.*"—See Kennedy v. Toronto.[1]

(*r*) The effect of this exception to item No. 8 is discussed by Sir John Thompson, Minister of Justice, in a report [2] upon a New Brunswick Act relating to the "Government House" property, which had been appropriated to the use of the provincial government by a federal order in council. In his view the effect of the appropriation was not to vest an absolute title in the Crown in right of the province, but merely to convey a usufructuary right.

(*s*) "In construing these enactments it must be always kept in view that, wherever public land with its incidents is 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." [3]

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

[10] Western Counties Ry. v. Windsor, &c., Ry., 7 App. Cas. 178: 51 L. J. P. C. 43: 1 Cart. 397. See *ante*, p. 163.

[1] 12 O. R. 201.

[2] Quoted in Lefroy, 592 (n).

[3] St. Catherines Milling Co. v. Reg., 14 App. Cas. 46; 58 L. J. P. C. 59; 4 Cart. 107.

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." [4]

In the earlier case [5] their Lordships' view of the effect of section 109 is thus stated:

"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. That construction of the statute was accepted by this Board in deciding *Attorney-General of Ontario* v. *Mercer*,[6] where the controversy related to land granted in fee simple to a subject before 1867, which became escheat to the Crown in 1871. The Lord Chancellor (Earl Selborne) in delivering judgment in that case said: 'It was not disputed in the argument for the Dominion at the bar, that all territorial revenues arising within each province from lands (in which term must be comprehended all estates in land) which at the time of the Union belonged to the Crown were reserved to the respective provinces by section 109; and it was admitted that no distinction could, in that respect, be made between lands then ungranted and lands which had previously reverted to the Crown by escheat. But it was insisted that a line was drawn at the date of the Union, and that the words

[4] Ont. Mining Co. v. Seybold (1903) A. C. 73; 72 L. J. P. C. 5. See *ante*, p. 90. See also Farwell v. Reg., 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."

[5] St. Catherines Milling Co. v. Reg., *ubi supra*. Approved and followed in Ont. Mining Co. v. Seybold, *ubi supra*.

[6] 8 App. Cas. 767; 52 L. J. P. C. 84; 3 Cart. 1.

were not sufficient to reserve any lands afterwards escheated which at the time of the Union were in private hands, and did not then belong to the Crown.' Their Lordships indicated an opinion to the effect that the escheat would not, in the special circumstances of that case, have passed to the province as 'lands;' but they held that it fell within the class of rights reserved to the province as 'royalties' by section 109." [7]

(*t*) In Mercer's Case [8] 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 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 conveyance 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, without express evidence of intention in that behalf, be construed as a transfer of the precious metals under such lands, the revenues derivable therefrom not being incident to the land (as are mines of baser metal), but arising from the prerogative rights of the Crown, which, under the word "royalties," passed to the provinces by force of section 109.[9] And in a recent case [10] Mr. Justice Street has held that the right to grant a license

[7] The holding of the P. C. in the Liquidators' Case, (1892) A. C. 437; 61 L. J. P. C. 75; 5 Cart. 1 (see *ante*, p. 137), 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.

[8] *Ubi supra.*

[9] Precious Metals Case, 14 App. Cas. 295; 58 L. J. P. C. 88; 4 Cart. 241. And see Reg. v. Farwell, 22 S. C. R. 553; Reg. v. Demers, 22 S. C. R. 482. In the last case cited, it was held 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] Perry v. Clergue, 5 O. L. R. 357.

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. (*u*)

Assets connected with Provincial debts.

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.

---

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.[1]

(*u*) "The expressions 'subject to any trust existing in respect thereof' and 'subject to any interest other than that of the province' 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."[2]

[1] See s. 91, No. 13.

[2] Indian Claims Case, (1897) A. C. 199; 66 L. J. P. C. 11. The claims of the Ojibeway Indians to increased annuities, under treaties made with them prior to 1867, were held not to fall within either class, so as to render Ontario liable to be called upon to apply the revenues arising from the surrendered lands toward payment of such annuities, which by s. 111 became chargeable to the Dominion. On the construction of the word "trust" see also the Common Schools Fund Case, 28 S. C. R. 609; (1903) A. C. 39; 72 L. J. P. C. 9.

Canada to be liable for Provincial debts.

111. Canada shall be liable for the debts and liabilities of each province existing at the union (*v*).

Debts of Ontario and Quebec.

112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt (*w*) of the province of Canada exceeds at the union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Assets of Ontario and Quebec.

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.

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.

(*v*) The words 'debts and liabilities' cover contingent and deferred as well as present liabilities.[3] A claim for compensation for a bridge, built under an Act of (old) Canada which provided that after a certain period the bridge should become Crown property, was held to be a liability falling upon the Dominion under this section 111.[4]

(*w*) The word 'debt' in this section has the same extended meaning as the words 'debts and liabilities' in section 111, and covers contingent and deferred as well as present liabilities.[5]

[3] Indian Claims Case, *ubi supra*, see *per* Strong, C.J., in The Queen v. Yule, 30 S. C. R. 24; affirming 6 Ex. Ct. R. 103.

[4] The Queen v. Yule, *ubi supra*. The P. C. refused leave to appeal. The adjustment of the accounts between the Dominion and the two provinces is provided for in s. 142, *post*.

[5] *Re* Arbitration between Ont. and Quebec, 30 S. C. R. 151.

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.
Tamiscouata advance account.
Quebec turnpike trust.
Education—east.
Building and jury fund, Lower Canada.
Municipalities fund.
Lower Canada superior education income fund.

Debt of Nova Scotia.

114. Nova Scotia shall be liable to Canada for the amount (if any) by which its public debt exceeds at the union eight million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Debt of New Brunswick.

115. New Brunswick shall be liable to Canada for the amount (if any) by which its public debt exceeds at the union seven million dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

Payment of interest to Nova Scotia and New Brunswick.

116. In case the public debts of Nova Scotia and New Brunswick do not at the union amount to eight million and seven million dollars 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.

Provincial public property.

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.

Grants to Provinces.

118. The following sums shall be paid yearly by Canada to the several provinces for the support of their governments and legislatures:

	Dollars.
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 one thousand eight hundred and sixty-one, 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.

Further grant to New Brunswick.

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 sixty-three thousand dollars per annum; but as long as the public debt of that province remains under seven million dollars, a deduction equal to the interest at five per centum per annum on such deficiency shall be made from that allowance of sixty-three thousand dollars.

Form of payments.

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.

Canadian manufactures, etc.

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. (*x*)

Continuance of Customs and Excise Laws.

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.

Exportation and Importation as between two Provinces.

123. Where customs duties are, at the union, leviable on any goods, wares, or 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.

Lumber dues in New Brunswick.

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 Bruns-

---

(*x*) Notwithstanding this section, a provincial legislature may pass prohibitory liquor laws so long as the matter is dealt with as a local provincial matter.[6]

[6] Manitoba Liquor Act Case, (1902) A. C. 73; 71 L. J. P. C. 28. See, however, the Local Prohibition Case, (1896) A. C. 348; 65 L. J. P. C. 26; 5 Cart. 295 (answer to question 4).

wick, (*y*) 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.

Exemption of public lands, etc.

125. No lands or property belonging to Canada or any province shall be liable to taxation. (*z*)

Provincial Consolidated Revenue Fund.

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.

As to Legislative Councillors of Provinces becoming Senators.

127. If any person being at the passing of this Act a member of the legislative council of Canada, Nova Scotia, or

---

(*y*) The right to levy these duties was surrendered in 1871 upon terms.[7]

(*z*) Lands under lease to the Dominion government for military purposes cannot be taxed for municipal purposes;[8] on the other hand, the Dominion government has been held liable to pay water rates as being the price charged for a commodity furnished.[9]

[7] See 36 Vic. c. 41 (Dom.).

[8] Atty.-Gen. v. Montreal, 13 S. C. R. 352. See also City of Quebec v. Reg., 2 Ex. Ct. R. 450.

[9] Atty.-Gen. v. Toronto, 18 O. A. R. 622. For other cases in which this section is discussed, see Church v. Fenton, 5 S. C. R. 239; 1 Cart. 831; Reg. v. Wellington, 17 O. A. R. 421; *sub nom.* Quirt v. Reg., 19 S. C. R. 510.

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.

Oath of allegiance, etc.

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.

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 and 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 (*or 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.

Continuance of existing Laws, Courts, Officers, etc.

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. (*a*)

(*a*) The legislative bodies which were, after the union, to make laws for the Dominion and for the respective provinces

have their constitution and powers provided for in other sections of the Act. The different spheres of authority are defined. But, apart from these necessary provisions, account had to be taken of the body of laws and legal institutions—the executive staff, administrative and judicial—existing in the provinces at the union, and this is done by section 129.[10]

The whole body of laws—common law and statutory enactments—was continued, but with a clear line of division drawn through it by this section. Any repeal of that law, any Act in amendment of it, can now be enacted only by that legislature which, if the law which it is desired to repeal or alter were non-existent, could now enact it.[1]

For example: Upon the secularization of the "Clergy Reserves," a statutory commutation of the claims of the then Presbyterian clergy upon the revenues derivable from these "reserves" was effected, and by an Act of the province of Canada a Board was incorporated for the management of the fund so created. After Confederation, in contemplation of the union of the various Presbyterian bodies throughout Canada, the Quebec legislature passed an Act providing for the future disposal of this fund in the event of the union taking place. Somewhat similar legislation had taken place in Ontario.[2] In the view of the Privy Council, the corporation and the corporate funds were not capable of division according to the limits of provincial authority, and the Quebec Act was therefore held invalid:

"The Act of the parliament of the province of Canada was, after the passing of the B. N. A. Act, 1867, continued in force within the provinces of Ontario and Quebec by virtue of section 129 of the latter statute. . . . The powers

[10] See also ss. 130, 131, 134-144.

[1] Dobie v. Temp. Board, 7 App. Cas. 136; 51 L. J. P. C. 26; 1 Cart. 351; Local Prohibition Case, (1896) A. C. 343; 65 L. J. P. C. 26; 5 Cart. 295. The exception as to Imperial Acts in force in the pre-confederation provinces refers, of course, to Acts of express colonial application; see *ante*, p. 25. For other cases in which the operation of this section is discussed, see *ante*, pp. 100, 122, 237-9. In reference particularly, to the continuing of existing courts, see notes to No. 14 of s. 92, *ante*, p. 295 *et seq.*

[2] See Cowan v. Wright, 23 Grant 616,

conferred by this section upon the provincial legislatures of Ontario and Quebec to repeal and alter the statutes of the old parliament of the province of Canada, are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867. In order, therefore, to ascertain how far the provincial legislature of Quebec had power to alter and amend the Act of 1858, incorporating the Board for the management of the Temporalities Fund, it becomes necessary to revert to sections 91 and 92 of the B. N. A. Act, which enumerate and define the various matters which are within the exclusive legislative authority of the parliament of Canada, as well as those in relation to which the legislatures of the respective provinces have the exclusive right of making laws. If it could be established that, in the absence of all previous legislation on the subject, the legislature of Quebec would have been authorized by section 92 to pass an Act identical in its terms with the Act of 1858, then it would follow that that Act has been validly amended by the 38 Vic. c. 64. On the other hand, if the legislature of Quebec has not derived such power of enactment from section 92, the necessary inference is that the legislative authority required in terms of section 129 to sustain its right to repeal or alter an old law of the parliament of the province of Canada, is in this case wanting." [3]

The same principle was applied[4] in reference to a Dominion Act which purported to repeal the Canada Temperance Act of 1864, which applied to Upper Canada only.

"It appears to their Lordships that neither the parliament of Canada nor the provincial legislatures have authority to repeal statutes which they could not directly enact.[5] . . . In the present case the parliament of Canada would have no power to pass a prohibitory law for the province of Ontario,[6]

[3] Dobie v. Temp. B'd, *ubi supra*. Upon an examination of the Act of 1858, the committee was of opinion that it could not have been validly passed by the Quebec legislature and could not therefore after the union be altered or amended by provincial legislation.

[4] Local Prohibition Case, *ubi supra*.

[5] Citing Dobie's Case, *ubi supra*.

[6] Because the federal jurisdiction to pass a prohibitory law is grounded solely upon the "peace, order, and good government" clause

Transfer of officers to Canada.

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, (*b*) 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.

Appointment of new officers

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.

Treaty obligations.

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. (*c*)

---

and could therefore have no authority to repeal in express terms an Act which is limited in its operation to that province."

(*b*) "In saying they are federal officers, the statute must be understood *quoad* their federal duties, for the parliament of Canada could not legislate for their local duties."[7]

(*c*) In a case before Chief Justice Dorion,[8] it was argued that the Imperial Extradition Act of 1870 could not apply to Canada, because of the express power conveyed by this section. The Chief Justice, however, held that the two provisions are in no way inconsistent; but that, if they were, the Extradition Act, being an Imperial Act of later date, must

of s. 91, which only authorizes legislation "strictly confined to such matters as are unquestionably of *Canadian* interest and importance." See *ante*, p. 187.

[7] *Per* Ramsay, J., in Reg. v. Horner, 2 Steph. Dig. 450; 2 Cart. 317.

[8] *Ex p.* Worms, 22 L. C. Jur. 109; 2 Cart. 315.

Use of English and French languages.

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.

Appointment of executive officers for 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 depart-

---

govern in all matters relating to the extradition of fugitive criminals.[9]

[9] See also *In re* Williams, 7 P. R. (Ont.) 275. This section has already been referred to *ante*, pp. 61, 94.

ments over which they shall preside or to which they shall belong, and of the officers and clerks thereof.

Powers, duties, etc., of executive officers.

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 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 or 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.

Great Seal.

136. Until altered by the Lieutenant-Governor in Council, the great seals of Ontario and Quebec respectively shall be the same, or of the same design, as those used in the provinces of Upper Canada and Lower Canada respectively before their union as the province of Canada.

Construction of temporary Acts.

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.

As to errors in names.

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.

As to issue of Proclamations before Union to commence after Union.

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.

As to issue of Proclamations after Union.

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 now 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.

Penitentiary.

141. The penitentiary of the province of Canada shall, until the parliament of Canada otherwise provides, be and continue the penitentiary of Ontario and Quebec.

Arbitration respecting debts, etc.

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 On-

tario and Quebec have met; and the arbitrator chosen by the government of Canada shall not be a resident either in Ontario or in Quebec. (*d*)

Division of records.

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.

Constitution of townships in Quebec.

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.

Duty of Government and Parliament of Canada to make railway herein described.

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

---

(*d*) This section implements sections 111 and 112. It has itself been implemented by statutory arrangements sanctioned by the federal parliament and the two provinces.[10]

[10] See Indian Claims Case, (1897) A. C. 199; 66 L. J. P. C. 11; *ante*, p. 328; Common Schools Fund Case, (1903) A. C. 39; 72 L. J. P. C. 9; *ante*, p. 335; *Re* Arbitration, &c., 30 S. C. R. 151; *ante*, p. 336. 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.

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 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. (*e*)

Power to admit Newfoundland, etc., into the Union.

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 (*f*) in each case as are in the

---

(*e*) By virtue of the last clause of section 146, the various orders in council subsequently promulgated effecting the admission to the union of Rupert's Land and the North-Western Territory, and of British Columbia and Prince Edward Island are, in effect, Imperial Acts, and are, to those new portions of the Dominion, their constitutional charters.[1]

(*f*) There is no presumption either for or against a variation, so far as regards the added provinces, of the terms of original B. N. A. Act of 1867.[2] But "*prima facie*, terms taken from section 92 of the B. N. A. Act, to denote the sub-

[1] See *post*.

[2] Brophy v. Atty.-Gen. (Man.), (1895) A. C. 202; 64 L. J. P. C. 70; 5 Cart. 156.

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.

As to representation of Newfoundland and Prince Edward Island in Senate.

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.

---

ject of legislative authority of the Territories, bear the like meaning as in that Act."[3]

[3] Dinner v. Humberstone, 26 S. C. R. 252. The Act there in question, in which terms were employed taken from the B. N. A. Act, was a Dominion Act; but, it is submitted, the rule would apply *a fortiori* in the case of an Imperial Act copying the words of the B. N. A. Act.

CHAPTER VI.

THE B. N. A. ACT, 1871.

34-35 VIC., 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:—

Short title.

1. This Act may be cited for all purposes as "The British North America Act, 1871."

Parliament of Canada may establish new Provinces and provide for the constitution, &c., thereof.

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. (*a*)

Alteration of limits of Provinces.

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

(*a*) Can a new province be established with a smaller sphere of authority than that occupied by the provinces named

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. (*b*)

Parliament of Canada may legislate for any territory not included in a Province.

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. (*c*)

Confirmation of Acts of Parliament of Canada, 32 & 33 Vict., (Can). cap. 3, 33 Vict. (Can). cap. 3.

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 'govern-

---

in the B. N. A. Act, 1867? By the "B. N. A. Act, 1886,"[4] the three Acts are to be read together and may be cited as the "B. N. A. Acts, 1867 to 1886." And by section 6 of the B. N. A. Act, 1871, a Dominion Act establishing a province becomes, in effect, an Imperial Act—at all events an Act which cannot be altered by anything short of Imperial legislation.[5] It is submitted, therefore, that any new province created under this section must be given full provincial autonomy and powers as defined in the original B. N. A. Act, 1867.

(*b*) Under this section the limits of Manitoba have been twice altered and its territory considerably increased.[6]

(*c*) The legislative power conveyed by this section is a plenary power of legislation in respect of all matters within the ken of a colonial legislature.[7]

[4] See *post*, p. 364.

[5] Subject, of course, to alteration of boundaries by agreement under s. 3.

[6] See 40 Vic. c. 6, and 44 Vic. c. 14.

[7] Riel v. Reg., 10 App. Cas. 675; 55 L. J. P. C. 28; 4 Cart. 1. See Chap. IV., *ante*, p. 57.

ment of the Province of Manitoba,'" (*d*) 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.

Limitation of powers of Parliament of Canada to legislate for an established Province.

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, (*e*) 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.

(*d*) This Act is printed *post*, p. 355 *et seq.* By virtue of section 6 of this B. N. A. Act, 1871, it is Manitoba's Constitutional Charter, not to be altered save by Imperial legislation.

(*e*) This section is the all-important one, not merely to Manitoba but to any province to be hereafter created. It will tend to retard the creation of new provinces until the Territories are so well settled and organized as to be entitled to the same powers of self-government as are now enjoyed by the older provinces. It would be unfortunate to give the name of a province to any division of the Territories, unless at the same time full provincial autonomy were given. In fact it may be doubted if, under the above Act, a province could be created with less power than the provinces named in the B. N. A. Act.[8] However this may be, any Act of the parliament of Canada creative of a new province becomes at once, in effect, an Imperial Act—at all events an Act which can be altered by nothing short of Imperial legislation.

[8] See note to s. 2, *ante*, p. 352.

CHAPTER VII.

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* (*a*):

[*Assented to* 12*th 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 (*b*). Preamble.

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 establishment of a Government therefor, and to make

---

(*a*) By section 5 of the B. N. A. Act, 1871,[1] this Dominion Act, generally known as "The Manitoba Act," was validated. By section 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.

(*b*) 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.

[1] *Ante*, pp. 353-4.

provision for the Civil Government of the remaining part of the said Territories not included within the limits of the Province:

Therefore Her Majésty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Province to be formed out of N.W. territory when united to Canada.

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: (*c*)

Its name and boundaries.

Certain provisions of B.N.A. Act, 1867, to apply to Manitoba.

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 appliable 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.

(*c*) *The boundaries as here defined were afterwards altered, and the area of the Province enlarged.* *See ante*, *p.* 353; *also R. S. C. c.* 47.

Representation in the Senate.

3. The said Province shall be represented in the Senate of Canada by two Members, (*d*) 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.

Representation in the House of Commons

4. The said Province shall be represented, in the first instance, in the House of Commons of Canada, by four Members, (*e*) 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.

Qualification of voters and members.

5. Until the Parliament of Canada otherwise provides, the qualification of voters at Elections (*f*) 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.

(*d*) Now 4.

(*e*) Now 7. See 55-56 Vic. c. 11 (Dom.); also *ante*, p. 120 *et seq.*

(*f*) See *ante*, p. 122, *et seq.* The restriction imposed by the latter part of the section has been removed.

Lieutenant-Governor.

6. For the said Province there shall be an officer styled the Lieutenant-Governor, (*g*) appointed by the Governor-General in Council by instrument under the Great Seal of Canada.

Executive Council.

7. The Executive Council (*h*) 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.

Seat of Government.

8. Unless and until the Executive Government of the Province otherwise directs, the seat of Government of the same shall be at Fort Garry, (*i*) or within one mile thereof.

Legislature.

9. There shall be a Legislature for the Province, consisting of the Lieutenant-Governor, and of two Houses, (*j*) styled respectively, the Legislative Council of Manitoba, and the Legislative Assembly of Manitoba.

[*Sections* 10-13 *relate to the defunct Legislative Council.*]

Legislative Assembly.

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.

Quorum.

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.

(*g*) See *ante*, p. 136, *et seq.*

(*h*) The provisions of this and the following sections, relating to the provincial constitution, have all been the subject of provincial legislation. See R. S. Man. (1888); and see also notes to B. N. A. Act, 1867, s. 92, No. 1, *ante* p. 248, *et seq.*

(*i*) Now "Winnipeg."

(*j*) Now only one. The Legislative Council was abolished by 39 Vic. c. 29 (Man.); see *ante*, p. 147.

[*Sections* 16 *to* 18 *relate to first elections, electoral districts, and qualifications of voters. They are long since effete.*]

Duration of Legislative Assembly.

19. Every Legislative Assembly shall continue for four years (*k*) 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.

Sessions at least once a year.

20. There shall be a Session of the Legislature once at least in every year, so that twelve months shall not intervene between the last sitting of the Legislature in one Session and its first sitting in the next Session (*l*).

Certain provisions of B.N.A. Act, 1867, to apply.

21. The following provisions of the British North American 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 (*m*).

Legislation touching schools subject to certain provisions.

22. In and for the Province, the said Legislature may exclusively make Laws in relation to Education, (*n*) 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:—

(*k*) See *ante*, p. 152.

(*l*) See *ante*, p. 110, 152.

(*m*) Compare B. N. A. Act, 1867, s. 87, *ante*, p. 153.

(*n*) This matter is fully dealt with; *ante*, p. 322, *et seq.*

(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;

Power reserved to Parliament.

(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 for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.

English and French languages to be used.

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.

Interest allowed to the Province on a certain amount of the debt of Canada.

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, interest at the rate of five per centum per annum on the sum of four hundred and seventy-two thousand and ninety dollars.

Subsidy to the Province for support of

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 shown 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. Government and in proportion to its population.

26. Canada will assume and defray the charges for the following services:— Canada assumes certain expenses.

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. General provision.

[*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 Ungranted lands vested in the Crown for Dominion purposes.

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.

Provisions as to Indian title.

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.

Grant for half breeds.

Quieting titles.

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:—

Grants by H.B. Company.

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.

The same.

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.

Titles being occupancy with permission;

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 extinguish-

ed, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

By peaceable possession.

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.

Lieutenant-Governor to make provisions under Order 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.

Governor in Council to appoint form &c., of grants.

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.

Rights of H. B. Company not affected.

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.*]

CHAPTER VIII.

THE B. N. A. ACT, 1886.

49-50 VICTORIA (IMP.), CHAPTER 35.

A.D. 1886.

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 (*a*).

[*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:—

Provision by Parliament of Canada for representation of territories.

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.

Effect of Acts of Parliament of Canada.

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

---

(*a*) The effect of this Act is discussed in the notes to sections 21 and 37 of the B. N. A. Act, 1867, pp. 113 and 120.

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 (*b*).

Short title and construction.

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.

(*b*) The general effect of this section is discussed, *ante*, p. 113 (as to the Senate), and *ante*, p. 120 (as to the House of Commons).

CHAPTER IX.

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 B. N. A. Act.[2] 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[3] 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 B. N. A. 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[4] known as Rupert's Land had been under the control of the Hudson's Bay Company ever since, in 1670, King Charles II. granted his charter to those "adventurers trading into Hudson's Bay," and as lords-proprietors they 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

[2] Sections 146 and 147; *ante*, pp. 350-1.

[3] See Dom. Stat., 1872, p. lxiii.

[4] 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."

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, 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 provides

"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 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 do not in any way touch our subject. 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, the legislative power was conferred by the order in council operating as an Imperial Act by virtue of section 146 of the B. N. A. 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 when the province of Manitoba was established full legislative power was given to the parliament of Canada over all territories not included within the boundaries of any province,[5] so that any possible distinction which might have been urged as arising from the difference in the phraseology of the two earlier enactments is entirely obliterated.

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"[6] 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 Lieuten-

[5] B. N. A. Act, 1871, s. 4; *ante*, p. 353.
[6] 32-33 Vic. c. 3.

ant-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 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."[7] The provisions of this Act as to Manitoba have been already dealt with.[8] As to the remaining portions of the territories about to become part of the Dominion, the only amendment

[7] "The Manitoba Act," 33 Vic. c. 3.

[8] *Ante*, p. 353.

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 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 to the present the Dominion parliament has had the power to legislate for the North-West Territories in reference to all matters within the ken of a colonial legislature;[9] and although large powers of local self-government have been conceded to the inhabitants of these Territories, they are held at the will of the parliament of Canada. To what extent that parliament will interpose in reference to matters over which legislative power has been conferred on the North-West assembly, depends on "conventions" not capable of accurate definition. No doubt before very long a new province or provinces will be formed out of these territories. The position, therefore, is so evidently temporary that it is difficult to decide to what extent of detail one should go in discussing the present position of the North-West Territories. What is written will in all probability be in a very short time of historical interest merely. Present usefulness therefore must guide, leaving the future to take care of itself. Because, however, 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

[9] See *ante*, p. 353.

passed,[10] containing the same provisions as had been made by those Acts; and the B. N. A. 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."[1]

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[2] 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

[10] 34 Vic. c. 16 (Dom.).

[1] See *ante*, p. 353.

[2] By 36 Vic. c. 5, the membership of the council was increased to a maximum of 21 instead of 15, the minimum remaining at 7.

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."

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,[3] 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.[4]

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—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,[5] was in force for only some six months, and as a reference to the ordinances passed at

[3] *Ante*, p. 371.

[4] See particularly 36 Vic. c. 35, as to the Administration of Justice.

[5] 38 Vic. c. 49, s. 7; repealed by 40 Vic. c. 7.

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[6] 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 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 R. S. C. (1886).

The North-West Territories Act, 1875, was, as above intimated, amended in a most important particular by 40 Vic.

[6] Section 8.

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 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 he 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 exerciseable 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.[7]

[7] See 45 Vic. c. 28, and 47 Vic. c. 23.

The participation of Manitoba judges in the administration of justice in the Territories was abolished except in the matter of appeals in capital cases.[8]

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;[9] 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. Muncipal institutions in the Territories, subject to any legislation by the parliament of Canada heretofore or hereafter enacted:

"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 as it was carried at once into the Revised Statutes of that year we need not stay to consider its provisions.[10]

At the present time the position of these territories is defined by "The North-West Territories Act" (R. S. C. c. 50), and amendments thereto.[1] 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.

[8] See also 48-49 Vic. c. 51.

[9] No assembly was constituted until 1888; see *post*.

[10] It was proclaimed 18th February, 1887: the R. S. C. took effect 1st March, 1887.

[1] The council was replaced by a legislative assembly in 1888—54-55 Vic. c. 22. Section 6 of that Act defines the assembly's jurisdiction. See *ante*, p. 350-1, as to the construction of terms taken from the B. N. A. Act.

CHAPTER X.

BRITISH COLUMBIA.

The proceedings which culminated in the admission of British Columbia to the union sufficiently appear in the following:—

ORDER IN COUNCIL

RESPECTING

THE PROVINCE OF BRITISH COLUMBIA.[2]

AT the Court at *Windsor*, the 16th day of *May*, 1871.

PRESENT.

The QUEEN'S MOST Excellent Majesty.

His Royal Highness Prince ARTHUR.

Lord Privy Seal.	Lord Chamberlain.
Earl Cowper.	Mr. Secretary Cardwell.
Earl of Kimberley.	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 Honorable Privy Council, on addresses from the houses of parliament of Canada and

[2] See Dom. Stat., 1872, p. lxxxiv. See also B. N. A. Act, s. 146.

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 Columbaia 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 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.[3]

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 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 admis-

[3] The address of the House of Commons is identical in its terms.

sion 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 60,000, 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.[4] 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 other provinces of the Dominion, those goods, wares, or merchandise may, from and after the union, be imported

[4] See 35 Vic. c. 37. On 27th March, 1872, British Columbia decided to accept the Canadian tariff, hence the enactment.

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[5] 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[6] 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.

[5] See the Precious Metals Case, noted, *ante*, p. 91.
[6] See Reg. v. Demers, noted, *ante*, p. 334.

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 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.[7]

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

[7] 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.

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 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 British 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.

CHAPTER XI.

PRINCE EDWARD ISLAND.

The admission of Prince Edward Island to the Dominion was effected by the following Order in Council:

At the Court at *Windsor,* the 26th day of *June,* 1873.

PRESENT:

The QUEEN'S Most Excellent Majesty.

Lord President. Earl of Kimberley.

Earl Granville. Lord Chamberlain.

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 dictricts 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 relat-

ing 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 readjusted, 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.[8]

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 legislatures, the latter specifying the electoral districts as set out in the Order in Council.

[8] P. E. I. has recently been held by the Supreme Court of Canada to be subject to the redistribution clause of the B. N. A. Act; see *ante*, p. 132.

APPENDICES.

A. QUEBEC RESOLUTIONS.

B. COLONIAL LAWS VALIDITY ACT, 1865.

C. LETTERS PATENT CONSTITUTING THE OFFICE OF GOVERNOR-GENERAL OF CANADA.

D. INSTRUCTIONS TO ACCOMPANY SAME.

E. IMPERIAL STATUTES WHOSE OPERATION IN CANADA HAS BEEN JUDICIALLY CONSIDERED.

APPENDIX A.

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. Immdiately 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 of 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) Savings 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 posses 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 Legis-

lature 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.

APPENDIX B.

COLONIAL LAWS VALIDITY ACT, 1865.

28-29 Vic., Cap. 63, (Imp.).

An Act to remove Doubts as to the Validity of Colonial Laws.

[29th June, 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:—

Definitions "Colony."

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;*

"Legislature," "Colonial Legislature";

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;

"Representative Legislature";

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;

"Colonial Law."

The term "Colonial Law" shall include laws made for any colony, either by such Legislature as aforesaid or by Her Majesty in Council;

Act of Parliament, etc., when to extend to Colony;

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;

"Governor";

The term "Governor" shall mean the officer lawfully administering the Government of any colony;

"Letters Patent."

The term "Letters Patent" shall mean letters patent under the Great Seal of the United Kingdom of *Great Britain* and *Ireland*.

Colonial Law when void for repugnancy.

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.

Colonial Law when not void for repugnancy.

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.

Colonial Law not void for inconsistency with instructions.

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.

Colonial Legislatures may establish, &c., Courts of law.

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.

Representative Legislature may alter Constitution.

Certified copies of laws to be evidence that they are properly passed.

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 *primâ 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 *primâ facie* evidence of such disallowance or assent.

Proclamation to be evidence of assent and disallowance.

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:

Certain Acts of Legislature of South Australia to be valid.

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.

APPENDIX C.

DRAFT OF 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 Ameria 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 Ourself 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.

APPENDIX D.

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.

APPENDIX E.

TABLE OF IMPERIAL STATUTES

With Memorandum of Cases in which their operation in the Colonies has been in question:

Magna Charta: Enforced in NOVA SCOTIA (*Meisner* v. *Fanning*, 2 Thomp. 97; *The Dart*, Stewart). Printed with R. S. British Columbia (1897), p. xvii.

Hen. III. (Charters of): Enforced in NOVA SCOTIA (*Meisner* v. *Fanning*, 2 Thomp. 97), 42.

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; *ante*, p. 43).

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 Thom. 12. 2nd ed.).

8 Hen. VI., c. 29 (aliens): Not in force in NOVA SCOTIA (*Reg.* v. *Burdell*, 1 Old. 126; *ante*, p. 43).

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*, pp. 42-3).

18 Hen. VIII., c. 16 (forfeiture): In force in NOVA SCOTIA (*ante*, pp. 42-3).

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); NEW BRUNSWICK (*Doe d. Hanington* v. *McFadden*, Berton, 153); in ONTARIO (see Digests); 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. 44).

32 Hen. VIII., c. 32 (partition): In force in NOVA SCOTIA (*Doane* v. *McKenny*, James, 328; *ante*, p. 44).

32 Hen. VIII., c. 9 (pretended titles): In force in NOVA SCOTIA (*ante*, p. 45); (*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*, pp. 44-5).

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.

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. 51).

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. 49) ; 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; 58 L. J. P. C. 67).

13 Geo. II., c. 18 (*certiorari*) : Not in force in Nova Scotia (*ante*, pp. 43-4) ; nor in New Brunswick (*ante*, p. 46) ; in force in British Columbia (see R. S. B. C. (1897) c. 42).

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. 50) ; 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).

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.

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. 45 (*habeas corpus*) : Printed with R. S. B. C. (1897) p. xli.

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.

INDEX

GENERAL INDEX.

NOTE.—See also "Table of References to B. N. A. Act" *ante*, pp. xix. For convenience of reference and comparison, sections 91 and 92 are printed side by side in their entirety on pp. 160, 161; and by reference to the head-lines adopted throughout the notes to the B. N. A. Act (Chap. V.) any section or subsection may be quickly found.

A.

C.

D.

G.

H.

I.

J.

L.

M.

Q.

R.

S.

T.

U.

V.

W.

Y.