THE PREROGATIVE OF THE CROWN IN EXTERNAL AFFAIRS AND CONSTITUENT AUTHORITY IN A COMMONWEALTH MONARCHY

by

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... continued

CHAPTER V

STATUTORY MODIFICATION OF PRIVILEGE: THE POWERS AND THEIR EXERCISE IN CANADA

(1) General Rules of Legislative Competence

It may be taken as clear and settled law that the privileges which inhere in legislative bodies as common-law incidents do not differ, whether the legislatures' of which they form part are representative[1] or non-representative;[2] whether they have been summoned by the Crown,[3] or created by Imperial statute;[4] and whether they have been constituted in settled territories,[5] or in conquered or ceded ones, even though an antecedent system of law should, in general, survive in the latter.[6]

In settled territories it is, probably, not possible for the Crown by its simple prerogative act to invest legislative bodies with greater privileges than those which they would enjoy at common law,[7] for this would amount to changing the law by exercise of the royal prerogative; but such action is clearly open to the Crown in conquered or ceded territories, so long as the prerogative of legislation survives therein.[8]

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1. Kielley v. Carson (1841-2) 4 Moo. P.C. 63; 13 E.R. 225.

2. Chenard v. Arissol [1949] A.C. 127.

3. Kielley v. Carson (1841-2) 4 Moo. P.C. 63; 13 E.R. 225.

4. Fenton v. Hampton (1858) 11 Moo. P.C. 347; 14 E.R. 727; per Lord Chief Baron Pollock, 11 Moo. P.C. at 397: 'An attempt was made to distinguish the present case from those cited, the authority of the Legislative bodies in those cases being derived from the Crown; whereas, the Legislative Council of Van Diemen's land derives its legislative authority from a Statute of the Imperial Parliament. We think there is no foundation for this distinction...'.

5. Kielley v. Carson (1841-2) 4 Moo. P.C. 63; 13 E.R. 225; see esp. 4 Moo. P.C. at 84-6; Fenton v. Hampton (1858) 11 Moo. P.C. 347; 14 E.R. 727.

6. Doyle v. Falconer (1866) L.R. 1 P.C. 328; Chenard v. Arrissol [1949] A.C. 127.

7. Per Lilly, J., in Re Edward Kielley (1838) 2 Nfld. L.R. 72: 'If it be said that the King's commission, which called the Assembly into existence, if it even contained express words to that effect, could grant such a power [as committal for

It has been denied in a Privy Council *dictum* that a legislature will have authority to make laws with respect to its own constitution by reason only of its authority to legislate for the peace, order and good government of its territory,[9] though this is questionable; but it has been conceded that even if so limited such power would in any event support a good deal of legislation on privileges, since 'it does authorize the enactment of rights, privileges and immunities whether these be general or in favour of particular classes of persons';[10] and these words were spoken by the Privy Council in support of the validity of a statute protecting members from action and prosecution in respect of words spoken in the House.

But whether or not such a restriction is well founded, it is clear that, at all events since the *Colonial Laws Validity Act*, 1865,[11] all *representative* legislatures, as defined by the Act, have such power,[12] and are indeed by the Act deemed at all times to have had it. In principle, moreover, it seems clear that representative legislatures, at least, would have enjoyed the necessary power even at common law.[13]

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contempt], I deny it; for the King can no more make a law than either branch of the Legislature.'

Again, in *Kielley* v. *Carson* (1838) 2 Nfld. L.R. 91 at 97, *per* Lilly, J., dissenting: '[I]f the terms of the Charter were even more express in favour of the power claimed by the Assembly, still the King cannot, in virtue of his prerogative, take away any of the rights of his subjects by common law. The King cannot change or dispense with the common law, by his Charter...'.

The Privy Council, on appeal, reserved opinion on this point: Parke, B., observing (1841-2) 4 Moo. P.C. 63 at 86, 'Their Lordships give no opinion upon the important question whether, in a settled country such as *Newfoundland*, the Crown could by its prerogative, besides creating the Legislative Assembly, expressly bestow upon it an authority, not incidental to it, of committing for a contempt--an authority, materially interfering with the liberty of the subject, and much liable to abuse. They do not ente upon that question, because they are of opinion, upon the construction of the Commission and of its accompanying document, that no such authority was meant to be communicated to the Legislative Assembly of *Newfoundland*; and if it did not pass as an incident, by the creation of such a body, it was not granted at all.'

Whenever by competent legislation the privileges of the United Kingdom House of Commons have been transferred to a colony, the Privy Council has repudiated summarily any attempt to confine the effect of such legislation. Dill v. Murphy[14] rejected without calling counsel the argument that a constitutional power to define privileges by statute meant only a power to elaborate them seriatim and not a power to adopt them all by reference; The Speaker of the Legislative Assembly of Victoria v. Glass[15] refused to accept the suggestion that the referential adoption of the privileges of the Commons at Westminster carried over only the power to commit for contempt, and not the privilege of deciding without review what constitutes contempt and committing by general warrant.

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8. Doyle v. Falconer (1866) L.R. 1 P.C. 328 at 341; per Sir James Colvile: 'There may or may not be good reasons for giving by express grant to such an Assembly as this, privileges beyond those which are legally and essentially incident to it. In the present instance, this possibly might have been done by the instrument creating the Assembly; since Dominica was a conquered or ceded Colony, and the introduction of the law of England seems to have been contemporaneous with the creation of the Assembly.'

9. Chenard v. Arissol [1949] A.C. 127; per Lord Reid for the Board, at p.132; see post, p. 329 ff.

10. Ibid.

11. 28 & 29 Vict., c.63 (Imp.).

12. Section 1 defines representative legislatures as those including a legislative body half elected by the inhabitants; section 5 declares that representative legislatures have, and are deemed at all times to have had, power to make laws respecting 'the Constitution, Powers, and Procedure of such Legislature', provided such laws are made in proper manner and form.

13. The Privy Council, in Kielley v. Carson, many years before the Colonial Laws Validity Act, referred to the representative legislatures summoned by the Crown in settled territories as 'supreme within the limits of the colony', though 'subordinate to Parliament': 4 Moo. P.C. 63 at 85.

(2) Competence of the Canadian Parliament

Though it was originally intended that the privileges of the Canadian Senate and House of Commons should be those of the Lords and Commons at Westminster respectively,[16] section 18 of the British North America Act, 1867, provided that:

In Re Kielley, Lilly, J., assumed its existence in adverting to other colonies; he said (1838) 2 Nfld. L.R. 72 at 84: '[I]f in any of them (Nova Scotia for instance) the power of punishing by imprisonment for breach of privilege is exercised by the House of Assembly, it is not necessarily because the House of Commons exercises the same power, nor of any inherent right in the Assembly to exercise such power. It may be that in such colony they originally enacted and declared by a law what the rights and privileges of the several branches of the Legislature were, and conferred upon them the power of punishing summarily for a breach of those privileges.'

Again, Lilly, J., suggested that it be used in Newfoundland if it were desired that the House of Assembly should have the privileges in dispute; (1838) 2 Nfld. L.R. 72 at 90: '[I]f it be considered that the omnipotent powers which they have arrogated are necessary, then let it be so declared and enacted by the Legislature.'

So, too, in Kielley v. Carson (1838) 2 Nfld. L.R. 91, per Lilly, J., 104: '[S]urely if it be deemed desirable or expedient, that they should possess further powers or privileges, and especially vindictive ones, they have in their own hands the means of legally acquiring them. It is quite competent for the Assembly, by an enactment in which the different branches of the Legislature may concur, to define and establish by law such powers and privileges...'.

See also, e.g., Hill v. Weldon (1845) 5 N.B.R. 1 at 57. Compare, however, a dictum of The Earl of Halsbury, L.C., in Fielding v. Thomas [1896] A.C. 600: 'According to the decisions which have been given by this Board there is no doubt that 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 fro contempt without express authority from the Imperial Legislature.' If his Lordship is referring to anything more than the division of legislative powers between the Dominion and the provinces, it is submitted that this dictum cannot be supported.

14. (1864) 1 Moo. P.C. (N.S.) 487; per Lord Cranworth at 514: 'The Colonial Parliament have clearly defined the privileges claimed, and could not have done so in any way more convenient. But it has been said, that it was not to the benefit of the Colonists if they were forced to refer to the law of a Foreign country in order to ascertain the law under which they were placed. This use of the term "Foreign," as applied to England, was, to say the least, a very extraordinary one...[I]n no sense could the law in the Colony, or England be said to stand to it in the relation of a Foreign country.'

> '18. The Privileges, Immunities, and Powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the Members thereof respectively shall be such as are from Time to Time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this 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.' [Emphasis added].

This, in effect, allowed the Parliament of Canada to fix the privileges of its respective Houses, subject to an upper limit defined with reference to the privileges of the House of Commons at Westminster and its members on March 29th, 1867. The inconvenience of this rule became apparent in connection with the attempt by the Parliament of Canada in 1873 to provide that all committees of the Senate and Commons of Canada should have power to examine witnesses on oath, when so empowered by the respective houses.[17] An earlier act of 1868[18] had authorized the examination of witnesses on oath at bar of the Senate, and by select committees of the Senate or Commons of Canada upon matters relating to private bills referred to them. The occasion of the wider act of 1873 was the great Pacific Scandal, arising from an arrangement whereby a group of American and Canadian railway promoters would finance the Conservative election campaign for an interest in the contracts for construction of the Canadian Pacific Railway, and which brought down Sir John A. Macdonald's government.

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15. (1871) L.R. 3 P.C. 560.

16. London Resolutions; being the resolutions of the delegates from the Provinces of Canada, Nova Scotia, and New Brunswick, held at the Westminster Palace Hotel, London, December 4, 1866; Resolution 30. The London Resolutions may be found in many collections; for example, Ollivier, British North America Acts and Selected Statutes, 1867-1962, (Ottawa, 1962)

It was desired to establish a Committee of the Commons to investigate the charges, and the bill enabling witnesses to be examined on oath was duly assented to by the Governor-General, the Earl of Dufferin, despite some qualms as to its validity; partly on the favourable advice of Alpheus Todd.[19] Indeed, the House of Commons at Westminster had only obtained for itself and its committees, in 1871, a general statutory authority to examine witnesses on oath;[20] and as the Parliament of Canada could confer on its houses no greater privileges than those available to the Commons at Westminster in 1867, the Imperial Government, on the advice of the law officers of the Crown, disallowed the new Canadian Act of 1873,[21] and warned that the earlier Act of 1868 was itself partly void for repugnancy to the British North America Act, 1867, though this had earlier escaped notice.

The result was an Imperial statute, The Parliament of Canada Act, 1875,[22] to validate the Canadian Act of 1868 and to substitute in the British North America Act, 1867, a new section 18, which provided:

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17. 36 Vict., c.1 (Can.).

18. 31 Vict., c.24 (Can.).

19. See W.E. Hodgins, Correspondence, Reports of the Ministers of Justice and Orders in Council Upon the Subject of Dominion and Provincial Legislation (Ottawa, Government Printing Bureau, 1896) pp.13-9.

20. The Parliamentary Witnesses Oaths Act, 1871, 34 & 35 Vict., c.83; superseding and repealing the more restrictive provisions of 21 & 22 Vict., c.78 (U.K., 1958) and 34 Vict., c.3 (U.K., 1871).

21. See correspondence, etc., indicated in note 19, ante.

22. 38 & 39 Vict., c.38 (U.K.).

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

This Act imposed, as it were, a fluctuating limit instead of one fixed as at 1867. Privileges might be reduced at Westminster without reducing privileges at Ottawa; but, under the terms of section 18 as it stands to-day, a reduction in privileges at Westminster would mean a reduction in the power of the Parliament of Canada to prescribe privileges. A privilege, though lost at Westminster, would not disappear in Ottawa; but, were it abrogated at Ottawa as well, it could not thereafter be restored at Ottawa. The Parliament of Canada could not repeal its own statutes in the confidence of being able to re-enact them. It may, of course, be argued that the power of constitutional amendment conferred on the Parliament of Canada in 1949[23] embraces the power to repeal expressly or by implication s.18 of the B.N.A. Act itself. The correctness of this position depends upon whether the proviso to section 18, limiting the power of Parliament to prescribe privileges, gives rise to a provincial right or privilege; or, whether the proviso is such that a law repealing it would be a law which 'regards matters coming within the classes of subjects' assigned exclusively to the Provincial legislatures. In other words, does section 18 of the British North America Act create any federal-provincial boundary line? Not every prohibition on the exercise

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23. The British North America (No.2) Act, 1949; 13 Geo.VI, c.81.

of a federal power need be said to give rise to what one may, following the Australian terminology, call an 'inter se' question.[24] If the Parliament of Canada may abrogate the proviso to section 18 of the B.N.A. Act, 1867, then that proviso does not limit its legislative power; but the constitutional amendment power now enjoyed by the Parliament of Canada has limited prospects of longevity.

(3) Competence of Canadian Provincial Legislatures

The legislatures of the Canadian provinces may exclusively make laws in relation to the amendment of 'the Constitution of the Province, except as regards the Office of Lieutenant Governor'.[25] This has been held to embrace sufficient authority to make laws to prescribe the privileges of the houses of these legislatures. In Fielding v. Thomas[26] the Privy Council sustained in 1896 the validity of a Nova Scotia statute inter alia (i) conferring on the two then-existing houses of the provincial legislature, and their committees and members, the privileges (except as to matters and cases specially dealt with by any provincial statute) of the Senate and Commons of Canada respectively--which by that date meant in substance the privileges of the Commons at Westminster;[27] (ii) prohibiting various things

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24. See section 74 of the Commonwealth of Australia Constitution and Anstey Wynes, Legislative, Executive and Judicial Powers in Australia 3rd. ed., (Sydney, 1962) pp.669 ff.

25. B.N.A. Act, 1867, s.92:1.

26. [1896] A.C. 600 (Privy Council: Lord Halsbury, L.C., Lord Herschell, Lord Watson, Lord Macnaghten, Lord Morris, Lord Davey, and Sir Richard Couch); on appeal from Thomas v. Haliburton (1893) 26 N.S.R. 55 (Supreme Court of Nova Scotia McDonald, C.J., Weatherbe and Ritchie, JJ., and Graham, E.J. See also In re Thomas (1901) 21 B Canadian Law Times (Supreme Court of Nova Scotia: Ritchie, Townshend, Graham and Meagher, JJ.).

27. Revised Statutes of Nova Scotia, 5th series, 1884, c.3., s.20:

as constituting infringements of the statute, more particularly, insults to, and assaults and libels upon, members of either House during the session, and disobedience of the orders of the houses;[28] (iii) making each house a Court of Record for the purpose of summarily inquiring into and, after twenty-four hours, punishing, things declared an infringement of the statute;[29] (iv) providing that persons guilty of infringing the statute should be liable to imprisonment for such time during the session as the House inquiring into the violation should determine; but requiring the nature of the offence to be

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'20. In all matters and cases not specially provided for by this Chapter, or by any other statute of this Province, the Legislative Council of this Province and the committees and members thereof respectively, shall at any time hold, enjoy and exercise such and the like privileges, immunities and powers as shall be for the time being held, enjoyed and exercised by the Senate of the Dominion of Canada, and by the respective committees and members thereof, and the House of Assembly and the committees and members thereof, respectively, shall, at any time, hold, enjoy and exercise such and the like privileges, immunities and powers as shall for the time being be held, enjoyed and exercised by the House of Commons of Canada, and by the respective committees and members thereof; and such privileges, immunities and powers, of both houses, shall be deemed to be and shall be part of the general and public law of Nova Scotia, and it shall not be necessary to plead the same, but the same shall in all courts of justice in this Province, and by and before all justices and others, be taken notice of judicially.'

28. Ibid., s.29:
'29. The following acts, matters and things are prohibited, and shall be deemed infringements of this Chapter:
(1.) Insults to or assaults or libels upon members of either house during the session of the legislature.
(2.) Obstructing, threatening or attempting to force or intimidate members of either house.
(3.) The refusal or failure of any member or officer of either house, or other person, to obey any rule, order of resolution of such house.
(4.) The offering to or acceptance by any member of either house of a bribe to influence him in his proceedings as such, or the offering to or acceptance by any such member of any fee, compensation or reward for or in respect of the promotion of any bill, resolution matter or thing submitted to or intended

succinctly and clearly stated and set forth on the face of any warrant issued for a commitment;[30] and (v) providing that

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to be submitted to either house or any committee.

(5.) Assualts upon or interference with officers of either house while in the execution of their duty.

(6.) Tampering with any witness in regard to evidence to be given by him before either house or any committee.

(7.) Presenting to either house or to any committee any forged or falsified document, with intent to deceive such house or committee.

(8.) Forging, falsifying or unlawfully altering any of the records of either house or of any committee, or any document, or petition presented or filed, or intended to be presented or filed before such house or committee, or the setting or subscribing by any person of the name of any other person to any such document or petition with intent to deceive.'

29. Ibid., section 30. Per Lord Halsbury for the Board, [1896] A.C. 600 at 612: 'It may be that s.30, 31 of the Provincial Act if construed literally and apart from their context would be ultra vires. Their Lordships are disposed to think that the House of Assembly could not constitute itself a Court of Record for the trial of criminal offences. But read in the light of the other sections of the Act, and having regard to the subject-matter with which the Legislature was dealing, their Lordships think that those sections were merely intended to give to the House the powers of a Court of Record for the purpose of dealing with breaches of privilege and contempt by way of committal. If they mean more than this, or if it be taken as a power to try or punish criminal offences otherwise than as an incident to the protection of members in their proceedings, s.30 could not be supported.' Section 30 reads as follows:

> '30. Each house shall be a court of record, and shall have all the rights and privileges of a court of record for the purpose of summarily inquiring into and (after the lapse of twenty-four hours) punishing the acts, matters and things herein declared to be violations or infringements of this Chapter; and for the purposes of this Chapter each house is hereby declared to possess all such powers and jurisdiction as may be necessary for inquiring into, judging and pronouncing upon the commission or doing of any such acts, matters or things, and awarding and carrying into execution the punishment thereof provided for by this Chapter, and amongst other things each house shall have power to make such rules as may be deemed necessary or proper for its procedure as such court as aforesaid.'

30. Ibid., s. 31, which reads as follows:

> '31. Every person who shall be guilty of an infringement or violation of this Chapter shall be liable therefor (in addition to any other penalty or punishment to which he may by law be subject) to an imprisonment for such time during the session of the legislature then being held, as may be

no member of either house should be liable to action or prosecution, arrest, imprisonment, or damages, for anything brought by him by petition, bill, resolution, motion, or otherwise, or said by him, before either house; and indeed making the very bringing of such proceedings, the causing of arrest or imprisonment, or the awarding of damages, a violation of the statute.[31]

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determined by the house before whom such infringement or violation shall be inquired into. The nature of the offence shall be succinctly and clearly stated and set forth on the face of any warrant issued for a committment under this section.'

One may add the following, of which s.33 is especially interesting:

> '32. Either house may establish rules for its government and the attendance and conduct of its members, and alter, amend and repeal the same; and may punish members for disorderly conduct or breach of the rules of such house. The rules and orders of each house existing at the time this Chapter shall come into operation shall continue in force as far as applicable, until altered, amended or repealed. All rules of either house not inconsistent with this Chapter shall have the force and effect of law, until altered, amended, or repealed by such house.'
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> '33. The determination of the proper house upon any proceeding under this Chapter shall be final and conclusive.'

31. Ibid., s.26. Sections 24 to 27 provided as follows:

> '24. Either house may at all times command and compel the attendance before such house or before any committee thereof, or before any joint committee of both houses, of such persons, and the production of such papers and things as such house or committee may deem necessary for any of its proceedings or deliberations. Any person neglecting or refusing to attend or to produce such papers and things before such house or committee, shall be guilty of a violation of this Chapter.
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> 25. No person shall be liable in damages or otherwise for any act done under the authority of either house and within its legal power, or under or by virtue of any warrant issued under such authority; all such warrants may command the aid and assistance of all sheriffs, bailiffs, constables, and others; and every refusal or failure to give such aid or assistance when required shall be an infringement of this Chapter.
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> 26. No member of either house shall be liable to any civil action or prosecution, arrest, imprisonment or damages, by reason of any matter or thing brought by him

The Privy Council suggested, surprisingly enough, that the Nova Scotia Legislature could, quite apart from the British North America Act, 1867, rely on section five of the Colonial Laws Validity Act, 1865, as the source of its authority,[32] but, in any event:[33]

> 'Their Lordships are, however, of opinion that the British North America Act itself confers the power (if it did not already exist) to pass Acts for defining the powers and privileges of the provincial legislature. By s.92 of that Act the provincial legislatures may exclusively make laws in relation to matters coming within the classes of subjects enumerated (inter alia), the amendment from time to time of the constitution of the province, with but one exception, namely, as regards the office of Lieutenant-Governor.
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> It surely cannot be contended that the independence of the provincial legislatures 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.'

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by petition, bill, resolution, motion or othewise, or said by him before such house; and the bringing of any such action or prosecution, the causing or effecting any such arrest or imprisonment and the awarding of any such damages, shall be deemed violations of this Chapter.'

27. Except for any breach of this Chapter, no member of of either house shall be liable to arrest, detention or molestation for any debt or cause whatever of a civil nature, during any session of the legislature, or during the fifteen days preceding or the fifteen days following such session; and any such arrest, detention or molestation shall be an infringement of this Chapter.'

32. [1896] A.C. 600 at 610:

> '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 (28 & 29 Vict. c.63) 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.'

33. Ibid., at p. 611

The action[34] which raised these questions for judicial determination had been brought by the respondent Thomas, Mayor or Truro, Nova Scotia. The town council had exhibited articles of complaint against one Lawrence, the recorder, charging him with misbehaviour in office as recorder and as member of the Assembly, more particularly for allegedly having promoted the Act which had increased his own salary; and Thomas had signed and published a petition which annexed a copy of the articles and which included statements reflecting on Lawrence's conduct. On motion of Lawrence, a resolution was passed by the Assembly declaring Thomas in breach of privileges, and ordering him to attend at Bar. Thomas had done so and there contended that he had acted in good faith, and in the course of duty, and that he had been guilty of no libel; but, having been required to withdraw and remain in attendance, and being later ordered to be called in and reprimanded, he refused to obey, left the premises, and was by order of the House arrested by the serjeant-at-arms, brought to the Bar of the House and by it committed to the common gaol of Halifax for forty-eight hours unless the session were sooner prorogued.

He obtained his release upon a habeas corpus in the Supreme Court of Nova Scotia which, '[w]ithout going into the question of ultra vires [of the statute]' held that the warrant under which he was imprisoned was defective:[35]

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34. The facts are taken as given at [1896] A.C. 600 at 601-2.

35. The warrant may be found at (1901) 21 B Canadian Law Times 503; the various resolutions and warrant at (1893) 26 N.S.R. 55 at pp.69-72. The habeas corpus proceedings are In re Thomas (1892) 21 B Canadian Law Times 503. The judgment of the Court was given by Ritchie, J., for himself and Townshend, Graham, and Meagher, JJ.

> 'They think that the House of Assembly is not a general court of record, but is only a court of record for the purposes specified in the Act, and that the commitment is not under the Act, because it does not set forth succinctly and clearly an offence against any of the provisions particularly set out in th 29th section, and which do not cover the offence alleged in the warrant.'

Nor (said Ritchie, J., for the Court) could the general clause conferring privileges as at Ottawa--a clause by its very terms confined to cases not specially provided for--assist:[36]

> 'They also think that the Legislature, having enacted certain matters which are all in their nature contempts, and provided a way by which they are to be punished, and required the warrant to set out these things clearly, has modified the effect of the general clause, No. 20, and can only proceed for contempt in the way pointed out by the Act, and not by a general warrant.
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> As regards the ingenious point taken...that the Legislature was acting as a court of record inquiring into a libel, and that this contempt was committed in the face of the Legislature while so inquiring, the Court are of the opinion, if that were the case, and assuming that they had the right to punish for a contempt committed in that way, that the warrant, even then, would not be sufficient, because the House of Assembly, being a court of limited jurisdiction, and not at every meeting sitting as a court, the warrant must shew that they were sitting as a court of record, which the warrant in question does not do.'

Moreover, if the Assembly was a court of record, the warrant was bad because it was not, and did not profess to be, under seal, and did 'not run in the name of Her Majesty like the warrant of any court of record that I ever heard of.'[37] Not only did the general conferral of privileges as at Ottawa give way to the specific

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36. 21B Canadian Law Times 503 at 505-6.

37. Ibid., p. 506.

provisions of the Act as to the form warrants must take; equally, 'in the opinion of the Court the effect of the general section has been modified by the special provisions, and therefore...have not the power to commit for contempt in excess of that specially conferred by the statute.'[38] In any event, it was thought, the warrant was bad for committing the prisoner to one other than an officer of the House--namely the keeper of the common gaol.[39]

Shortly after being released, plaintiff brought the action in damages which came before the Privy Council, against the appellants, Hon. W.S. Fielding, Premier of the Province [later a distinguished Minister of Finance of the Dominion] and other members of the Government and the Assembly, to a total of twenty-three, for having by their votes in the Assembly caused his unlawful imprisonment. Plaintiff obtained a verdict for two hundred dollars damages at trial before Townshend, J., and a jury, against all the defendants save four who were relieved by a special act of indemnity; on motion to set aside the verdict, the Supreme Court of Nova Scotia were equally divided.[40]

Indeed, Ritchie, J., who had found in Thomas' favour (on habeas corpus) that the warrant could not support his imprisonment, found against him (in the damage action) on the ground that, if the Assembly had been sitting competently as a court of record, they were not liable in their judicial capacity to an action in damages; if, on the contrary, the statute was ultra vires in so far as it constituted the Assembly

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38. Ibid.

39. There seems to be little foundation for such a view; the process of the Commons at Westminster is enforced by common peace officers and gaolers.

40. (1893) 26 N.S.R. 55.

a court of record, the Assembly was nevertheless protected by section twenty-six of the Act, which indemnified members from suit for matters and proceedings brought, or words spoken, before the Assembly. Wetherbe, J., while thinking that the statute had validly made contempts punishable by the Assembly[41] and that indeed Thomas' petition was such a contempt,[42] thought that, even assuming that the 'House of Assembly was wrong in coming to the conclusion that the plaintiff could be in any manner punished for his conduct in relation to the petition;' yet nevertheless, the House of Assembly had jurisdiction to try that question;[43] and, going further, even supposing that the provincial statute could not confer jurisdiction to try a libel, yet nevertheless the Assembly was entitled to enter upon the investigation, and had a jurisdiction to rule upon and decline jurisdiction:[44]

> '[A]ssuming the charge could not be maintained, I am unable to follow the reasoning that, even because the act or a portion of the act under which the proceedings began must be held ultra vires, there was no jurisdiction to try that question, and there was no power to pass resolutions as to where the plaintiff should stand, and when he should leave during the proceedings.
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> It is not claimed to be ultra vires to make orders of this kind, or to dismiss or modify the complaint in view of the powers conferred by the statute.
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> There may be, therefore, another view taken of this subject without refining too much. We are familiar with that class of cases where courts have been held to have been without jurisdiction in giving the judgment attacked, though such

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41. Ibid., pp.65-69.

42. Ibid., p.64.

43. Ibid., p.68; emphasis added.

44. Ibid., pp.68-9.

courts were held to have had jurisdiction to enter upon the investigation which resulted in the wrong judgment. Assuming, therefore, the House of Assembly was wrong in coming to the conclusion that the plaintiff could be in any manner punished for his conduct in relation to the petition, in the first instance it must be observed that the imprisonment complained of was not awarded as punishment for the substantive offence, but for refusal to attend the House during the investigation. At any rate if the tribunal had ordered his attendance on the occasion of his absenting himself, for the purpose of dismissing the compalint against him for want of jurisdiction, there can, I think, be no doubt he would be bound to attend, and the contention now raised would, in any view, fall.'

Graham E.J., (McDonald J. concurring) took the view that the House of Assembly had attempted to adjudicate upon and punish the crime of libel, and to punish plaintiff for contempt in not having submitted to its sentence,[45] and had so infringed the exclusive jurisdiction of the Parliament of Canada with respect to criminal law; with the result that there was no power to try or punish for libel, no contempt in not submitting to the sentence, no jurisdiction at all, and consequently a right of action in damages. His Lordship further denied that either the Colonial Laws Validity Act or the British North America Act provided any foundation for provincial legislation to adopt privileges as at Westminster, or to empower its houses even to punish contempts; particularly in the absence of any section in favour of the provinces analogous to section 18 in favour of the Dominion, and such powers not being necessary incidents.

This view, which had been rejected by Ritchie, J., was equally rejected by the Privy Council. To meet the contention that the exclusive federal jurisdiction over criminal law had been infringed, the Earl of Halsbury said, for the Board:[46]

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45. Ibid., p. 72 ff.

46. [1896] A.C. 600 at 611.

'It is further argued that the order which the respondent disobeyed was not a lawful order, or one which he was under any obligation to obey. The argument seems to be that the original cause of complaint was a libel; that though the particular breach of the Act complained of was the disobedience to the orders of the House, yet as those orders were issued in reference to a certain petition presented to the House the contents of which were alleged to be libellous and during the investigation of the question who was responsible for its presentation, and as it must be assumed that a libel is a matter beyond the jurisdiction of the House to be inquired into, inasmuch as libel is a criminal offence and the crinimal law is one of the matters reserved for the exclusive jurisdiction of the Dominion Parliament, the whole matter was ultra vires, and both the members who voted and the officers who carried out the orders of the House are responsible to an ordinary action at law.

> Their Lordships are unable to acquiesce in any such contention. It is true that the criminal law is one of the subjects reserved by the British North America Act for the Dominion Parliament; but that does not prevent an inquiry into and the punishment of an interference with the powers conferred upon the provincial legislatures by insult or violence. The legislature has none the less a right to prevent and punish obstruction to the business of legislation because the interference or obstruction is of a character which involves the commission of a criminal offence, or brings the offender within reach of the criminal law. Neither in the House of Commons of the United Kingdom nor the Nova Scotia Assembly could a breach of the privileges of either body be regarded as subjects ordinarily included within that department of state government which is known as the criminal law.'

Putting the matter affirmatively, the provincial constitutional amendment power supported legislation in relation to privilege.[47]

The result was that the Privy Council expressly supported the appellant defendants on two grounds. They found that sections 20 and 26 of the provincial statute each provided sufficient independent grounds of defence; though it is interesting that nothing was explicitly rested on section 29, the section creating the contempts of insulting members and disobeying orders of the houses.

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47. [1896] A.C. 600 at p. 610-611; ante p.

Section 26, of course, was the provision for indemnity against actions and prosecution; of it their Lordships said:[48]

> 'But independently of these considerations [i.e., the validity of section 20] the provisions of s. 26 of the Act of the provincial legislature would in their Lordships' opinion form a complete answer to the action even if the act complained of had been in itself actionable. Their Lordships are here dealing with a civil action, and they think it is sufficient to say that legislature could relieve members of the House from civil liability for acts done and words spoken in the House whether they could or could not do so from liability to a criminal prosecution.'

Though this is rather wide, in that provisions though dealing with civil rights could nevertheless fall with the rest of a statute in substance ultra vires, yet nevertheless one may take it that the legislatures enjoy sufficient authority to indemnify against civil actions in respect of torts generally; and as may be clearly inferred, the subject-matter of the act in which such a provision was found, was not, in their Lordships' view, such as to make the provision merely incidental to an ultra vires enactment.

But not only the indemnity of section 26 was put forward to defeat the action. Section 20, which had conferred privilege as at Ottawa in cases not specially provided for, had thus carried over the Westminster Commons' privileges to Nova Scotia save on matters specially dealt with by a local statute. The Privy Council, having supported the legislative competence of the Provinces to deal with the subject matter,[49] had referred to the terms of the Bill of Rights[50]--'That the

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48. [1896] A.C. 600 at 613.

49. Ante p.264; affirmatively upon the B.N.A. Act, s.91:1 and the Colonial Laws Validity Act, s. 5; negatively upon the view that it did not encroach on federal authority, especially in relation to criminal law.

50. 1 Wm. & M., Sess. II, c. 2, s. 1, sub.-s.9.

freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament'--and had then concluded:[51]

> 'Their Lordships are, therefore, of opinion that s.20 of the Provincial Act is not ultra vires and affords a defence to the action.'

The significance of this seems clear: the provincial legislatures were competent to effect a general adoption of privileges as at Westminster; and, so far as the indemnity section might not give a defence, the Westminster privilege of free speech would. The members could therefore not be made liable in respect of their votes.

It is interesting to note that nothing was rested on the section creating the various contempts themselves--the contempt of insulting, libelling, or assaulting members, for example; and that of disobeying orders of the houses--all in section 26. Indeed, the Earl of Halsbury had quoted the section only as to the offence of insult, libel or assault; and, so far from relying on the words about disobeying orders of the houses, had said that 'The other provisions of the section are immaterial to the present purpose;'[52] and this though Thomas had been detained precisely for disobeying an order of the Assembly. This would suggest that the Privy Council were not relying on any determination of their own that Thomas had indeed committed any contempt; but rather, perhaps, on the Assembly's jurisdiction to decide for itself whether he had or not; or, more probably (since the Act after all required the cause to appear on any warrant) on the view that the members' actions, lawful or not, were not susceptible

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51. [1896] A.C. 600 at p. 612.

52. [1896] A.C. 600 at p. 608.

of civil action, even though the warrants could be reviewed to ensure that they showed a sufficient cause to satisfy, for example, habeas corpus proceedings.

(4) Changing the Law by Resolution of the House

It would surely be otiose to set about accumulating authorities to demonstrate that a single house cannot by its order or resolution change the law; that, indeed, is merely a corollary of the proposition that the house is part only of the legislature. Even the rhetoric to this effect in Stockdale v. Hansard[53] was, surely, labouring what was obvious to all; what the House there claimed was a certain privilege under the law, of ordering papers printed, and a jurisdiction to decide whether, in law, they did have this privilege; not a privilege of altering the law.

Accordingly, the idea that a house may by its rules increase its own privileges had, where put forward, been summarily rejected.[54] (It is true, of course, that the house by the making of a rule may make a difference in its right, at common law, to deal with the breach as an obstruction.)

One might not have suspected that a reference, in the body of a constitution act or other statute, to a power of a legislative body to make rules or standing orders "for the orderly conduct" of its business, could be taken to confer a legislative power to enable the body to do or authorize that which, at common law--even in exercise of

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53. (1839) 9 Ad. & E. 1

54. In Woodworth v. Troop, (1876-7) 11 N.S.R. 84, arguendo at p. 99; rejected by Ritchie Eq. J. for the Court, '[I]f by the express terms of the rule all the right, and privileges of the Imperial Parliament had been conferred on the House, it would have been inoperative, as these could only be conferred by the whole legislature and not by one branch of it.'

a common law power to make rules to govern its business--it could not; as, suspend a member beyond a sitting. Still less would one incline to construe such a rule-making power as one of delegated legislation, when the power to make rules as to the orderly conduct of business was found to be in company with the same power in respect of the presidency in case of the absence of the Speaker, the mode of correspondence between the houses, the manner in which notices should be published of business intended to be brought before the houses, the proper passing, entitling and numbering of bills, and the proper presentation of the same to the Governor for royal assent.

Such, indeed, was the view of the New South Wales Supreme Court in Taylor v. Barton.[55] On appeal to the Privy Council, however, their Lordships, having decided[56] that at common law a suspension by a legislative body could not be interpreted to operate, and could indeed not lawfully operate, beyond a sitting [saving a possible right to suspend until apology], went on to hold that a standing order, made by one house under a power of the character above described, [requiring however the Governor's approval] could competently have authorized a longer suspension than permissible at common law--though, in the circumstances, it was held not to have done so;[57] so that a defence based on the standing order was rejected also. The Earl of Selborne there said:[58]

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55. (1884) 6 N.S.W.L.R. 1 at p. 23 per Martin C.J. for the Court.

56. Sub nom. Barton v. Taylor, (1886) 11 App. Cas. 197; see ante, p. 155 ff.

57. (1886) 11 App. Cas. 196 at p. 207.

58. Ibid.

> 'Their Lordships entertain no doubt of the validity of the standing order of the Legislative Assembly, adopting, so far as applicable to its proceedings, the rules, forms, and usages which were in force in the British House of Commons at the time when that standing order was passed and assented to by the Governor of New South Wales. They think it proper to add that they cannot agree with the opinion which seems to have been expressed by the Court below, that the powers conferred upon the Legislative Assembly by the Constitution Act do not enable the Assembly "to adopt from the Imperial Parliament, or to pass by its own authority, any standing order giving itself the power to punish an obstructing member, or remove him from the chamber, for any period longer than the sitting during which the obstruction occurred." This, of course, could not be done by the Assembly alone without the assent of the Governor. But their Lordships are of opinion that it might be done with the Governor's assent; and that the express powers given by the Constitution Act are not limited by the principles of common law applicable to those inherent powers which must be implied (without express grant) from mere necessity, according to the maxim, Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest. Their Lordships' affirmance of the judgment appealed from is founded on the view, not that this could not have been done, but that it was done, and that nothing appears on the record which can give the resolution suspending the respondent a larger operation than that which the Court below has ascribed to it.'

Just what legislative authority such a power comprehends is, of course difficult to say. As the rules or orders which may be made are defined by reference to their purpose only, why can they not equally inflict fine and imprisonment, if they may inflict a suspension not authorized by the common law? Plainly the Earl of Selborne's words are wide enough to comprehend this.

The view expressed in Barton v. Taylor[59] was resisted by a majority of the New South Wales Supreme Court in Crick v. Harnett;[60] who held ultra vires a standing order providing for the suspension of a member pending the disposition of criminal charges against him; indeed, the remarks of the Earl of Selborne in the Barton case were said to be obiter.[61] But, on appeal, the Privy Council,

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59. (1886) 11 App. Cas. 197

60. (1907) 7 S.R.(N.S.W.) 126 (Darley C.J. and Cohen J.; Pring J. dissenting).

61. (1907) 7 S.R. (N.S.W.) 126 at p. 133.

in Harnett v. Crick,[62] upheld the validity of the order; the courts of law, said Lord Macnaghten for the Board, having no right to question its validity 'unless, upon a fair view of all the circumstances, it is apparent that it does not relate to the orderly conduct of the Assembly.'[63] His Lordship thought that the House might reasonably consider that it did.

What is especially remarkable is that their Lordships were prepared to concede a legislative force to the standing order despite their recognition that:[64]

> 'They think that the provision in the Act as to the Governor's approval was not intended to have the effect of giving standing orders passed by the Assembly a validity which otherwise they would not have possessed. It seems rather to be a limitation on the powers of the Assembly, making the Governor's approval necessary for the validity of any standing order passed by that body under s.15.'

This means that where a power to make standing orders is set forth in a statute, and given to one house or to one house with the consent of the Governor, there will be various degrees of legislative power; first, acts of the legislature and next, rules or standing orders within the scope of the statutory provisions; all in addition to the common-law power of legislative bodies to order their affairs. Such a result is, surely, confused and disorderly; and there seems to be not the slightest reason why, merely because a legislative body's power to order its affairs is referred to in the Constitution Act, the result should in any way differ from the powers as they would be at common law. The tertium quid is superflous.

The difficulty of deciding just what limits can be put on the powers to make standing orders 'for the orderly conduct'

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62. [1908] A.C. 470.

63. [1908] A.C. 470 at p. 476.

64. [1908] A.C. 470 at p. 475.

of a legislative body, in the light of the holdings of the Privy Council supporting a power of derogation from the common law, is apparent from Enid Campbell's findings that 'the cases are inconclusive'.[65] Certainly the anomaly of the situation is of most concern in Australia, where a statutory power of making standing orders may be found in the constitutions of New South Wales;[66] Queensland;[67] and Victoria,[68] where it sits side by side with a section[69] expressly empowering the Legislature to define the privileges of the respective houses, but so as not to exceed those enjoyed at Westminster in 1855.

The answer, surely, is that a power of delegated legislation is not conferred merely because a power is set out in a statute. A bill of exchange is not a statutory instrument merely because the Bills of Exchange Act is a statute; were the law of contract codified in England, a contract would not for that reason become a statutory instrument; and, had the House of Lords appreciated that what is true of a company charter embodied in a statute[70] is not, for that reason laone, necessarily true of a company incorporated by instrument made under the authority of statute law,[71] English law might have been

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65. (1961) 3 University of Malaya L.R. 267 at 273 ff.; p. 277.

66. The Constitution Act, 1902, No. 32 (N.S.W.)

67. The Constitution Act, 1867, 31 Vict. No. 38 (Queensland).

68. 18 & 19 Vict. c. 55 (Imp.) (1855); s. 34.

69. Ibid., s.35.

70. Hawkes v. Eastern Counties Railway Company, 5 H.L.C. 331.

71. Ashbury Railway v. Riché, (1875), L.R. 7 H.L. 653 per Lord Selborne at p. 693, relying on Hawkes, ante, note 71. Lord Selborne also spoke for the Privy Council in Barton v. Taylor.

spared the absurdities of refusing even to impute to a corporation, a Contract entered into with it within the very letter of its objects, but which a string of Queen's Counsel, if engaged to advise upon every dealing, might have advised was outside its powers on a strict application of the eiusdem generis rule.[72]

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72. Canonising a policy which let him who can reconcile with the tort liability of the master for the servant in the course of employment, or the principal for acts within the apparent scope of the authority of the agent.

(5) Parliamentary Privileges in the Parliament of Canada

In pursuance of the authority conferred by section 18 of the British North America Act, 1867, the Parliament of Canada, in its first session, provided that the Senate and House of Commons of Canada should enjoy the privileges, immunities, and powers held, enjoyed and exercised by the Commons House of Parliament at Westminster and its members, at the time of the passing of the British North America Act, 1867, 'so far as the same are consistent with and not repugnant to the said Act.' It was at the same time enacted that these privileges should be part of the general and public law of Canada and noticed in all courts.[75] The same Act made printed copies of the journals of either house admissible in evidence;[76] gave an absolute defence in (and a summary and final stay of) civil and criminal proceedings arising from the publication of papers under authority of either house;[77] and also from the publication of copies by anyone;[78] and allowed as to extracts the defence of publication in good faith and without malice.

After the Imperial Parliament had in 1875 replaced section 18 of the B.N.A. Act, 1867, in order to allow the Canadian Parliament to confer on its houses privileges acquired by the Westminster Commons subsequently to 1867,[79] the formula of the Canadian statute was varied[80] to add to the earlier grant the following words:

> '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

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75. 31 Vict., c.23 (Can.); [22nd May, 1868]; sections 1 and 2.

76. Section 3.

77. Section 4.

78. Section 5.

79. Ante, p. 256 ff.

80. R.S.C. 1886, c.11, s.3.

> such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof respecitvely.'

The result is that the Senate and Commons of Canada hold the privileges of the Commons at Westminster as they existed on March 29, 1867, and such additional privileges since obtained at Westminster as have been extended to Canada by statute. The formula has continued in substance unchanged to the present day.[81]

The principal and perhaps only obvious accretion since 1867 has been the power to examine witnesses on oath. The early Canadian act of 1868[82] on the subject was doubtless valid insofar as it provided that committees hearing private bills could examine on oath,[83] for that had been possible in the Commons at Westminster since 1858;[84] but it was ultra vires so far as it allowed the Senate to examine on oath generally at its bar.[85] The Act was, however, validated by the Imperial Parliament by its act of 1875,[86] at the same time as the wider legislative powers were conferred. These new powers were exercised by the Parliament of Canada in 1876[87] to allow committees generally of the Senate or Commons to examine on oath whenever the respective houses thought fit to empower them

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81. R.S.C. 1906, c.10, s.4; R.S.C. 1927, c.147, s.4; R.S.C. 1952 c.249, s.4.

82. 31 Vict,, c.24 [22nd May, 1868].

83. Section 2.

84. 21 & 22 Vict., c.78 (U.K.).

85. Section 1; see ante, p. 257 ff.

86. The Parliament of Canada Act, 1875, 38 & 39 Vict., c.38 [19th July, 1875]; s.2.

87. 39 Vict., c.7 (Can.); [12th April, 1876], s.1 ff.

to do so. These provisions and subsidiary rules were carried on[88] until an Act of 1894 revised them in orderly fashion to allow either house to examine on oath at bar, and any committee of either house to examine on oath.[89] The law so settled has been continued to the present.[90]

(6) Parliamentary Privileges in the Canadian Provincial Legislatures

The entertaining controversies of the last century over the right of provincial legislatures to call themselves 'parliaments'[91] and the privileges to which they are entitled, have been largely forgotten with their vindication as legislative (and not municipal) bodies, supreme in their sphere, wielding legislative authority of enormous extent,[92] including a power, for practical purposes almost unlimited, to invest their houses with such privileges as they think fit.[93] Indeed, apart from the debatable power of the Parliament of Canada to repeal (in exercise of its 1949 powers of constitutional amendment[94]) the proviso to section 18 of the British North America Act, the powers of the provincial legislatures to confer privileges are wider than those of the Parliament of Canada, in the measure that the provincial legislatures may, but the Parliament of Canada may not, confer a privilege not enjoyed at Westminster.

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88. R.S.C. 1886, c.11, s.20 ff.

89. 57-58 Vict., c.16 (Can.); [23rd July, 1894].

90. R.S.C. 1906, c.10, ss.23 ff.; R.S.C. 1927, c.147, ss.24 ff.; R.S.C. 1952, c.249, ss.24 ff.

91. See the note by the author, 'Thrice the Brinded Cat Hath Mewed', (1965) 12 McGill L.J. 356.

92. Ibid.

93. Fielding v. Thomas [1896] A.C. 600; see ante, p.

94. Ante, p. 259-60.

Months after the Parliament of Canada had given to its respective houses the privileges of the Commons at Westminster,[95] the Legislature of Ontario put onto its own statute books a practical copy of the federal statute, conferring upon the Ontario Legislative Assembly and its members the privileges 'held, enjoyed and exercised by the Commons House of Parliament of the Dominion of Canada'.[96] Quebec[97] followed suit early in 1869, conferring the privileges of the Senate on its Legislative Council and those of the House of Commons on the Legislative Assembly.[98] The British Columbia Legislature did the same in its first session[99] in 1872, and Manitoba, in the third session of its first legislature, in the next year ;[100] both acts being, in the words of the successive Ministers of Justice who reported against allowing them to continue in operation, 'transcripts' of the Ontario act.[101]

The Ontario act was indeed referred to the law officers of the Crown in England, then Collier and Coleridge,[102] who reported adversely to its validity; and Sir John A. Macdonald, acting as Minister of Justice, recommended its disallowance

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95. Ante, note 75 p.279; 22nd May, 1868.

96. 32 Vict., c.3 (Ont.); [19th December, 1868].

97. 32 Vict., c.4 (Que.); [5th April, 1869].

98. Sections 1 and 2.

99. 35 Vict., c.4 (B.C.).

100. 36 Vict., c.2 (Man.); [8th March, 1873].

101. W.E. Hodgins, Correspondence, Reports of the Ministers of Justice and Orders in Council upon the Subject of Dominion and Provincial Legislation (Ottawa, Government Printing Bureau, 1896), pp. 1015 and 812, respectively.

102. Hodgins, op. cit., p. 85.

to the Governor General with the remark that while, in his view, the Parliament of Canada might, on the basis of its general legislative power in respect of the peace, order, and good government of Canada, have made provision, even in the absence of s.18 of theB.N.A. Act, for its houses to have privileges as at Westminster, nevertheless the provinces, being confined to the enumerated heads of section 92 of the B.N.A. Act, could not, in the absence of a provision in their favour analogous to section 18 in favour of the Dominion, do the same. It is interesting that he relied on the anomaly that to admit an analogous provincial authority would be to admit a power without even the restrictions to which the Dominion was subjected:[103]

> 'If it [the Ontario Legislature] has any power to legislate on the matter at all, it seems to follow that while the general Parliament can under the 18th clause, confer no greater privileges than those enjoyed by the Imperial House of Commons, the provincial legislature being bound by no such limitation, might, if it were so disposed, confer upon itself and its members privileges in excess of those belonging to the House of Commons of England.'

Vigorous and able exception was taken to the view of Sir John A. Macdonald and the English law officers by the Hon. John Sandfield Macdonald, Attorney-General of Ontario, and his government.[104] His very interesting and able arguments[105] were, in the long run, to prevail against those of Sir John and the law officers at Westminster, almost to the letter, and (it would seem) without the concession that the province must be limited as was the Dominion by the proviso to section 18 of the B.N.A. Act.[106] How the Ontario act would have fared had

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103. Ibid., pp.83 ff.

104. Ibid., pp.87-8.

105. Ibid. They profitably repay reading and are to a large extent unanswerable. He points out, for example, that the Ontario legislature can competently confer the privileges in dispute on any court or municipal body.

106. Ibid., at p.88.

it then come to a judicial test, one cannot, of course, know; when such legislation did, ultimately, come before the Privy Council in 1896, the Board were, as we have seen,.disposed in its favour.[107] But Sir John A. Macdonald adhered to his view, and the Ontario act was disallowed[108] by the Governor-General in Council, as was that of Quebec[109] at the same time. The British Columbia legislature repealed[110] its statute voluntarily after communication with the Canadian Government,[111] the local Attorney-General acquiescing in the opinion of the English law officers;[112] and on the three precedents, the Minister of Justice of the next government, Telesphore Fournier,[113] advised the disallowance of the Manitoba legislation.[114]

The pattern of present Canadian provincial legislation on privilege was set by 'An Act to uphold the authority and dignity of the Houses of the Quebec Legislature and the independence of the members thereof, and to protect persons publishing parliamentary papers', enacted by the Quebec Legislature on February 1st, 1870, to replace the short-lived statute of the previous year.[115]

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107. Fielding v. Thomas, [1896] A.C. 600.

108. Hodgins, op.cit., pp.92-3; by Proclamation of 4th December, 1869; Canada Gazette Vol.III, No.23, p.386.

109. 32 Vict., c.4 (Que.); Hodgins, op.cit., p.254-5; by Proclamation of 4th December, 1869; Canada Gazette Vol.III, No.23, p.385.

110. 36 Vict., c.35 (B.C.); Statutes of 1873.

111. Hodgins, op.cit., pp.1014-6.

112. Ibid., p.1016..

113. Later a justice of the Supreme Court of Canada.

114. Hodgins, op.cit., p.780. Order in Council disallowing the Act published in Canada Gazette of 12th September, 1874; Vol.8, No.11, p.262.

115. 33 Vict., c.5 (Que.); entitled "The Quebec Parliamentary Act".

It gave power to both Houses to compel the attendance of witnesses and production of papers[116] and things. Absolute privilege was given to persons publishing parliamentary papers,[117] and qualified privilege to those who published extracts.[118] Protection against liability in damages was conferred upon those who did any act under the authority of either house, and within its legal power.[119] No member of either house was to be liable to 'any civil action or prosecution, arrest, imprisonment, or damages by reason of any matter or thing brough by him by petition, bill, resolution, motion or otherwise, before the said house or said by him before such house';[120] indeed, the very bringing of such an action or prosecution, the causing or effecting of such arrest or imprisonment, and the awarding of such damages, were themselves made offences against the Act--the object of the last named prohibition being difficult to conceive unless it be the judges.[121] All warrants issued under the authority of either house might command the aid and assistance of all sheriffs, bailiffs, constables, and others, and every refusal or failure to give such aid or assistance when required was to be an infringement of the act.[122] The

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116. Section 2.

117. Section 10.

118. Section 11.

119. Section 3.

120. Section 5.

121. Ibid.

122. Section 3.

freedom of members from 'arrest, detention or molestation' for 'any debt or cause whatever of a civil nature' was to extend through the session and twenty days before and afterwards; any such 'arrest, detention or molestation' being itself an infringement of the act.[123] During the same periods, members, officers, employees, and persons summoned as witnesses before either house were to be exempt from jury duty.[124] In addition to the offences already mentioned, the act also made infringements of many other prohibited acts; assaults, insults, or libels upon members during or within a twenty-day period before and after the session; obstructing, threatening, or attempting to force or intimidate members; bribery or attempted bribery of members; assaults upon or interferences with officers in the execution of their duty; tampering with witnesses to be heard either by the house or a committee; presenting to either house or a committee, with intent to deceive, a forged or falsified document; and forging or falsifying the records of either house or a committee, or a petition or other document intended to be presented to it.[125]

The house in respect of which any infringement had been committed was empowered summarily to inquire into it in such manner and form as it should think proper; and for the purposes of the act 'each of the houses is hereby vested with all such powers and jurisdiction as may be necessary or expedient for enquiring into, judging, and pronouncing upon any such infringement, and awarding and carrying into execution the punishment thereof provided for by this act'.[126] The punishment referred to consisted of 'an imprisonment for such time, during the session of the legislature then being held', as

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123. Section 6.

124. Section 7.

125. Section 4.

126. Section 9.

might be determined by the house enquiring into the infringement.[127]

Despite his 'great doubts' as to the authority of the province to enact this law, Sir John A. Macdonald thought that it 'contain[ed] provisions necessary to uphold the authority and dignity of the provincial legislature', and therefore 'deem[ed] it inexpedient to interfere with the operation of the Act'--'it being, of course, open to any parties affected by it to dispute, before the legal tribunals, the constitutionality of the Act.' [128] The Act was soon widely imitated. On the strength of the precedent here laid down, a similar Ontario statute[129] was left in operation[130] despite doubts as to its validity and despite certain improvements upon the art of Quebec legislation; notably that in Ontario the Assembly was to have 'all the rights and privileges of a Court of Record for the purpose of summarily enquiring into, and punishing, as breaches of privilege or as contempt of court'[131] things prohibited by the act; and a privative clause to the effect that[132]

> '14. The determination of the legislative Assembly upon any proceeding under this Act and within the legislative authority of this Province shall be final and conclusive.'

The Ontario legislation also carefully created the additional offences of disobedience to subpoenas or warrants issued to compel the attendance of witnesses before the House or a committee; and of misbehaving in giving or refusing to give evidence, more particularly by giving false evidence or prevaricating.[133]

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127. Section 8.

128. Hodgins, op.cit., p.256; Report of 19th October, 1870.

129. 39 Vict., c.9 (Ont.); [10th February, 1876].

130. Hodgins, op.cit., p.146 ff.; Report by Edward Blake of 13th October, 1876.

131. But 'without prejudice to the liability of the offenders to prosecution and punishment criminally or otherwise according to law independently of this Act'. Section 11.

As the grudging allowance of the Quebec legislation had been treated as a precedent for not disallowing that of Ontario, so the Minister of Justice's report on Ontario served as a precedent for Manitoba.[134] Its legislature, as befitted the Canadian west in 1876, was quicker on the draw than Ontario, bringing onto its books an Act closely similar to the latter a week earlier,[135] though adding for the Speaker summary powers to commit disorderly members to the custody of the Sergeant-at-Arms.[136] Not, indeed, that the legislators of Manitoba were incapable of the refinements of the east: few, east or west, could more euphemistically abolish an upper house than in 'An Act to diminish the Expenses of the Legislature of Manitoba in certain respects',[137] yet with such grim determination.[138]

The Nova Scotia provisions which gave rise to the case of Fielding v. Thomas[139] and which we have examined in that connection,[140] originated in an Act of the year 1876.[141] It was a peculiar amalgam of the earliest type of provincial statute (adopting in toto the privileges of Ottawa and so of Westminster) and of the newer model (enumerating various powers and immunities and creating various offences). As Edward Blake, the Minister of Justice, noted indeed in his report,[142] legislation of other provinces had been disallowed for attempting to incorporate by reference privileges as at Ottawa. Here, of course, the wording differed marginally, in that these were only to apply where local legislation was silent; but the variation, it is clear, was not such as to give rise to a difference in principle. Other provisions more than made up for any discernible restraint; as the distinguished Minister[143] himself observed:[144]

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132. 39 Vict. c. 9 (Ont.); section 14.

133. Section 11.

134. Hodgins, op. cit., p. 812.

> 'Among the prohibited matters which are to be deemed infractions of this Act, and which are to be adjudged on and punished by the House is section 14, subsection 3, the refusal or failure of any member or officer of either House, or other person to obey any rule, order or resolution of such House. Whatever view may be taken of so much of this subsection as applies to members or officers of the House, it seems obvious that its application to the subject in general would be to put the subject at the mercy of either House, no matter what might be the nature of the rule, order or resolution which it passed.'

Only this, as to persons other than members, seems to have been eliminated as a concession to the Minister's objections. Other portions, giving to ''[a]ll rules of the House not inconsistent with this Act' the 'force and effect of law until altered, amended or repealed', stand to this day.[145]

The Nova Scotia Act was not materially amended, much less repealed or disallowed. It contained provisions conferring, in substance, privilege as at Westminster, and in some respects much more. Being left to its operation, and judicially canonised by the Privy Council in 1896,[146] the provinces were thereafter free to legislate on the subject without interference, save in the unlikely case that in so doing they infringed federal jurisdiction.

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135. 39 Vict. c. 12 (Man.); [4th February, 1876]. Where the Ontario Act had provided that the Assembly should have all the rights and privileges of a Court of Record, the Manitoba statute (in section 10) had provided also that the House should be a Court.

136. Ibid., section 17.

137. 39 Vict., c. 28;[4th February, 1876].

138. R.S.M. 1880, c. 5 s.3: 'The Legislative Council of Manitoba has ceased to exist, and hereafter shall have no existence, and the members of the Legislative Council of Manitoba, and the officers thereof, and every of them, have absolutely ceased and determined, and shall continue so absolutely ceased and determined.'

139. [1896] A.C. 600.

140. Ante, p. 260 ff.

141. 39 Vict. c. 22 (N.S.); they appeared, slightly amended, at the time of litigation, in R.S.N.S., 5th series, 1884, Title II, c. 3, s.19 ff.

How free they were may be seen from an examination of the Quebec provincial statute of 1922 entitled'An Act to amend the Revised Statutes, 1909, and to provide for the imprisonment of John H. Roberts'.[147] This Act, scarcely parallelled in the old dominions in modern times, attainted the person named of 'having violated the privileges of the Legislative Assembly and of having assailed its honour and its dignity', condemned him to imprisonment for one year in the common gaol from the royal assent to the Act (on the ground that detention for the session alone would be inadequate to his offence), and amended the general statute law to empower the houses to imprison for time certain not exceeding a year, without regard to the determination of the session.[148]

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142. Hodgins, op. cit., p. 495.

143. Blake had been briefly Premier of the Province of Canada, and was, in substance always and at times in name, head of the Liberal Party opposite Sir John A. Macdonald's Tories until Sir Wilfrid Laurier's accession to the leadership; and, had he wished, afterwards. The Prime Ministership of Canada was his for the asking during Alexander Mackenzie's Liberal administration of 1873-8, and he declined to be first Chief Justice of the Supreme Court of Canada which he had created in 1875. He died as Irish Nationalist member for South Longford in the Commons at Westminster in 1907, one of the most eminent legal and constitutional authorities ever produced by Canada.

144. Hodgins, op. cit., p. 496; report of November 13th, 1876.

145. R.S.N.S. 1954, c. 117, s.31.

146. Fielding v. Thomas, [1896] A. C. 600.

147. 13 Geo. V, c. 18; [29th December, 1922].

148. Now R.S.Q. 1964, c. 6, s.170. The Act reads as follows:

C H A P. 18

An Act to amend the Revised Statutes, 1909, and to provide for the imprisonment of John H. Roberts.

[Assented to, the 29th of December, 1922]

WHEREAS John H. Roberts, of the city of Montreal, editor of the newspaper called "The Axe", published in Montreal in the issue of the 27th of October, 1922, an

article containing the following passage:

"The names of two members of the Provincial "Legislature, are coupled with this sinister crime and "one may hear their names openly mentioned and their "alleged guilt publicly discussed in the city of Quebec, "and it is freely and frankly said that the cause of the "inaction on the part of the authorities in clearing up "the mystery and bringing the guilty to justice is "because of the fact of these two persons being Members "of the Legislature";

Whereas such passage of the said article refers to a murder, committed at Quebec in July, 1920, of a young girl named Blanche Garneau, under particularly atrocious circumstances, and which have greatly agitated public opinion;

Whereas, by such passage, the said John H. Roberts says and implies that the names of two of the members of this Legislature are coupled with such crime, that one may hear their names openly mentioned, that their guilt so alleged is freely discussed in Quebec, and that the inaction of the authorities in bringing the guilty to justice is because of the fact of these two persons being members of the Legislature;

Whereas such an accusation is of the most atrocious and infamous nature, and bears upon each one of the members of the Legislature;

Whereas such passage constitutes a violation of the privileges of the Legislature, an odious attack upon its honour and its dignity, and a calumny unprecedented in parliamentary annals;

Whereas the said John H. Roberts has been summoned by the Legislative Assembly to appear before it to justify himself;

Whereas the said John H. Roberts, having appeared before the bar of the Legislative Assembly, on the 2nd day of November, 1922, has refused, despite the repeated demands addressed to him, to divulge the names of the two members contemplated by the said passage of his article, which he admits to have written and published, thus rendering himself guilty of contempt of the orders of the Legislative Assembly;

Whereas the said John H. Roberts, instead of exonerating himself, has instead aggravated his position by the answers he has given during the course of his examination;

Whereas the Legislative Assembly, sole judge of its honour, its dignity and its privileges, has declared the said John H. Roberts guilty of having violated its privileges and of having committed the most grievious attack upon its honour and its dignity;

Whereas the detention of the said John H. Roberts, under the custody of the Sergeant-at-Arms, for the duration of the session, would be an insufficient and inadequate punishment for the offence he has committed;

Therefore, His Majesty, with the advice and consent of Legislative Council and of the Legislative Assembly of Quebec, enacts as follows:

1. The said John H. Roberts, having been declared guilty of having violated the privileges of the Legislative Assembly and of having assailed its honour and its dignity by the said passage of his article, by his refusal to justify it, and by the answers which he has given before the bar of the Legislative Assembly, is condemned to imprisonment in the common gaol of the district of Quebec, for one year to count from the sanction of this act, where he shall be conveyed by the Sergeant-at-Arms of the Legislative Assembly.

2. This act shall be the warrant or legal authority in virtue of which the said John H. Roberts shall be incarcerated and imprisoned in the said gaol.

The validity of his detention was unsuccessfully challenged by Roberts on habeas corpus before the special act relating to him had become law; the legality of his imprisonment under the general law as it then stood being supported by Bernier, J., in the Quebec Superior Court[149] on the authority of Fielding v. Thomas.[150] While the pending bill was not in issue, it was referred to, and the reasons of the Court clearly covered it.[151] The result is that, in this very important respect, the privilege of the Quebec Legislative Council and Assembly is greater than that of the Commons at Ottawa or even Westminster, since the Quebec houses may under the law as it stands today imprison for time certain up to a year.[152]

The legislation on the books today in various provinces follows the model sketched above, though there are differences of detail. Alberta[153] makes its Assembly a Court[154] whose determination is final and conclusive 'upon any proceedings under this Act';[155] the punishment it may inflict is the usual one of imprisonment during the session[156] at the discretion of the House. Apart from the usual power to send for persons, papers, and things which

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3. Article 136 of the Revised Statutes, 1909, is amended by replacing the words: "during the session then being held", in the second and third lines thereof, by the words: "not exceeding one year".

4. This act shall come into force on the day of its sanction.'

149. In re Roberts, unreported; the judgment (November, 1922) may be found only in a pamphlet entitled The Roberts Case: The Judicial and Social Point of View. Speech delivered in the Legislative Council on Wednesday, 22nd November, 1922, by The Honourable Adelard Turgeon.

150. [1896] A.C. 600.

151. In Re J.H. Roberts [1923] S.C.R. 152, Anglin, J., in Chambers refused a writ of habeas corpus on the ground that the cause was not one within the terms of the statute prescribing the original jurisdiction of the Supreme Court of Canada.

152. R.S.Q. 1964, c.6, s.70.

the House or a committee may deem necessary,[157] there is the now customary power to administer oaths.[158]

British Columbia keeps upon its statute books a distinct Constitution Act[159] which declares that it is lawful for the Legislature to define from time to time the privileges, immunities, and powers of the Assembly and its members, but adds the proviso that they are not to exceed those of the United Kingdom House of Commons on 14th February, 1871.[160] Caution has prompted a saving clause to the effect that the Act does not exclude rights, immunities, or privileges not therein expressly declared.[161]

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153. The Legislative Assembly Act, R.S.A. 1955 c. 174; The Legislative Assembly Act, 1955, Stat. Alta. 1955, c. 62; R. S. A. 1942, c. 4; R.S.A. 1922 c. 3; Stat. Alta. 1909, 9 Edw. 7 c. 2.

154. Ibid., R.S.A. 1955 c. 174 s. 43.

155. Ibid., s. 45.

156. Ibid., s. 44.

157. Ibid., s. 36.

158. Ibid., s. 38

159. R.S.B.C. 1960 c. 71; formerly C.S.B.C. 1888 c. 22; R.S.B.C. 1897 c. 47; R.S.B.C. 1911 c. 44; R.S.B.C. 1924 c. 45; R.S.B.C. 1936 c. 49; R.S.B.C. 1948 c. 65.

160. R.S.B.C. 1960, c. 71, s. 74.

161. Ibid., s. 75.

While an absolute privilege against civil proceedings is given to members in respect of words spoken in the B. C. Assembly,[162] this is limited in the case of the introduction into the Assembly, or the laying before it, of documents, by the restriction that it then avails only in the absence of actual and express malice.[163] The statutory protection against actions brought in respect of the publication of parliamentary papers[164] is expressly extended to prohibit suits in equity brought to restrain printing or publication. Provision is made for the examination of witnesses on oath.[165]

The power declared in its Constitution Act has been further exercised by the British Columbia Legislature in a distinct statute, the Legislative Assembly Privileges Act,[166] which begins by investing the Assembly, its committees, and its members with the privileges enjoyed 'by custom, Statute, or otherwise' by the United Kingdom House of Commons, its committees, and its members on February 14th, 1871, so far as not inconsistent with the Constitution Act. There follows an enumeration of privileges expressed to be 'for greater certainty' but 'not so as to limit the same, or to restrict the generality of this section'.[167] As to the rest, the Ontario Act is closely followed, including the privative clause[168] and imprisonment during the session as the mode of punishment.[169]

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162. Section 76.

163. Section 77.

164. Section 78.

165. Sections 79, 80 and 81.

166. R.S.B.C. 1960, c. 215; formerly 55 Vict. c. 28 (B.C.); [8th April, 1892]; R.S.B.C. 1897 c. 118; R.S.B.C. 1911 c. 137; R.S.B.C. 1924 c. 137; R.S.B.C. 1936 c. 150; R.S.B.C. 1948 c. 181.

167. R.S.B.C. 1960 c. 215, s.2.

168. Section 9.

169. Section 7.

The Legislature Act of Manitoba[170] is, as we have seen, closely similar to the Ontario Act,[171] but differs in some particulars; it is expressly made a court of record[172] with all consequent powers 'for the [limited] purposes of' the sections respecting the summoning and examination of witnesses;[173] but the section creating the various offences against the act is more ambiguous,[174] since it now, after various convolution, speaks simply of a court, and makes the prohibited acts punishible as breaches of privilege or contempts of court.[175]

More significant perhaps is the disappearance in Manitoba since The Legislative Assembly Act of 1937[176] of words which, until that date, limited the power of imprisonment to such time during the session of the Legislative Assembly then being held,[177] as may be determined. It is not easy to say whether the common law applies to limit the terms of this statutory power of imprisonment, created in favour of an Assembly to which the common law conceded none at all.

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170. R.S.M. 1954 c. 141; originally An Act respecting the Legislative Assembly, 39 Vict. c. 12; [4th February, 1876]; An Act respecting the Legislature of Manitoba, C.S.M. 1880 c. 5; R.S.M. 1892 c. 84; R.S.M. 1902 c. 96; R.S.M. 1913 c. 112; 1 Geo. VI c. 27 (Man); [April 17th, 1937]; R.S.M. 1940 c. 116.

171. Ante., p. 288.

172. Section 41.

173. The powers of examining witnesses on oath originate in 36 Vict. c. 3 (Man.); [8th March, 1873].

174. R.S.M. 1954 c. 141 s. 41(1) at the commencement; and s.42 (2) are to be compared with R.S.M. 1940 c. 116 s. 42(1) and 42(2) and earlier versions.

175. Ibid.

176. 1 Geo. 6 c. 27 (Man.); [April 17th, 1937].

177. Section 43; now R.S.M. 1954 c. 141 s. 42.

The privileges of the Legislative Assembly of New Brunswick are by statute those 'for the time being' of the Commons of Canada[178] and have been so since 1890.[179] Provision is made that nothing is to contravene or conflict with any intra vires federal legislation.[180]

Under the revised statutes of 1954, the position in Nova Scotia is substantially as already considered,[181] with privilege as 'from time to time' enjoyed by the Commons at Ottawa, save in cases specially provided for; accompanied by a list of specified privileges and of breaches punishable with imprisonment during the session as the House of Assembly may determine.[182] The experience of Payson v. Hubert[183] was evidently not wasted on the legislators of the province, for it is specially made a punishable breach to bring a civil action against the various officers for removing at the Speaker's order from the legislative precincts persons causing disturbances or using violent or insulting language.[184]

Newfoundland, till lately meek in its assertions of privilege under the strictures of the Privy Council in Kielley v. Carson[185] punishes its enumerated breaches of privilege

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178. R.S.N.B. 1952 c. 129 s.1; The Legislative Assembly Act.

179. 53 Vict. c. 6 (N.B.); [23rd April, 1890]; see also C.S.N.B. 1877 reproducing 33 Vict. c. 33; [7th April, 1870] as to examination of witnesses. Continued in C.S.N.B. 1903 c. 5; R.S.N.B. 1927 c. 7; and R.S.N.B. 1952 c. 129.

180. R.S.N.B. 1952 c. 129 s. 1 (2).

181. Ante. p. 260 ff.; 288 ff.

182. R.S.N.S. 1954, c. 117, s. 25 and ss. 35 ff; The House of Assembly Act. see R.S.N.S. 5th series, 1884, c.2; R.S.N.S. 1900, c.2; R.S.N.S. 1923, c.2; 1 Geo. VI c.2 (N.S.); [17th April, 1937].

183. (1904) 34 S.C.R. 400 (Supreme Court of Canada); ante,

with a penalty not exceeding one hundred dollars, and--but only in default of payment--with imprisonment during the session for such time as the House determines--but not exceeding three months.[186] The fine is unique, as is the absence of any right of imprisonment otherwise than for default in paying the fine; so too, is the limitation of imprisonment to three months.[187] Since its late confederation with Canada Newfoundland has evidently gained in confidence, for there is now also a general provision giving the House of Assembly and its members the same privileges, immunitites, and powers as are 'now'[188] enjoyed by the Canadian House of Commons and its members. The relationship of this provision with those already mentioned is unclear; quaere, num generalia specialibus derogent.

Prince Edward Island, smallest but not least in privileges, combines like Nova Scotia an enumeration (similar to that of Ontario) with a general adoption of the privileges of 'for the time being' of the House of Commons at Ottawa.[189]

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184. R.S.N.S. 1954 c. 117 s. 35 (m).

185. (1841-2) 4 Moo. P.C.63.

186. The House of Assembly Act, R.S.N. 1952, c.3, ss.10, 11 and 16.

187. See formerly C.S.N. 1892, c.2.

188. R.S.N. 1952, c.3, s.18.

189. The Legislative Assembly Act, R.S.P.E.I. 1951, c.85; s.33, s.37 ff.; continuing 4 Geo. VI, c.37; [May 2, 1940]. See also 26 Vict. c.15; [April 21, 1863].

Saskatchewan follows closely the Ontario model of enumerated privileges and specified offences.[190] It makes the Assembly a 'court' with 'all the rights, powers and privileges of a court' for the purpose of summarily inquiring into and punishing things prohibited by the act.[191]

Quebec, whose legislation[192] set the pattern for subsequent developments[193] has, apart from increasing the powers of its houses to imprison, already discussed, only marginally modified the original law. The houses indulged in 1886 in the courteous gesture of allowing their power to send for persons, papers, and things to be qualified by a saving for 'the privileges of the other House';[194] and at the same time members, officers, and witnesses before the houses were exempted by statute from attending the courts as witnesses

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190. The Legislative Assembly Act, R.S.S. 1965 c. 3. The original statute was The Legislative Assembly Act, 1906 c. 4; [May 26, 1906]; continued by R.S.S. 1920 c. 2; R.S.S. 1930 c. 3; replaced by 1938 c. 4; [March 23, 1938]; continued by R.S.S. 1940 c. 3, R.S.S. 1953 c.3; R.S.S. 1965 c. 3.

191. R.S.S. 1965 c. 3 s. 30.

192. 33 Vict. c. 5 (Que.); [1st February, 1870]. Revised and re-enacted with consolidations by 49-50 Vict., c. 97 (Que.); [21st June, 1886]; continued by R.S.Q. 1888 Art. 124 ff.; amended by 61 Vict. c. 12 (Que.); [15th January, 1898]; continued by R.S.Q. 1909 Art. 129 ff.; amended by 13 Geo. V. c. 18 (Que.); [29th December, 1922]; continued by The Legislature Act, R.S.Q. 1925 c. 3; R.S.Q. 1941 c. 4; R.S.Q. 1964 c. 6.

193. See ante p. 284 ff.

194. 49-50 Vict. c. 97 (Que.); now R.S.Q. 1964 c. 6 s. 63.

in civil matters--the act had in terms previously referred only to jury duty.[195] The power to administer oaths to witnesses is the oldest of all in Quebec; the Act to confer it[196] was given royal assent in 1869 on the same day as the abortive act to assume all the privileges of the Senate and Commons of Canada.[197]

Whether the common law would have privileged absolutely all proceedings in committee is not clear; this doubt was cleared by an act of 1898[198] assimilating the committees to the houses.

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195. Ibid., s 52.

196. 32 Vict. c. 6; [5th April, 1869]; now in R.S.Q. 1964 c. 6, 91.

197. 32 Vict. c. 4; [5th April, 1869]; ante, p. 282-4.

198. 61 Vict. c. 12 (Que.); [15th January, 1898]; now R.S.Q. 1964 c. 6 s. 67.

CHAPTER VI

EVOLUTION OF DOMINION LEGAL ORDERS UNDER THE COLONIAL LAWS VALIDITY ACT AND STATUTE OF WESTMINSTER

I THE LOGICAL INEVITABILITY OF JUDICIAL REVIEW

Every judicial decision (unless perhaps the most biased or visceral) involves, explicitly or implicitly, a decision as to the contents of the corpus of the law--a decision, explicit or implicit, that some proposition, whether novel or long settled--is, or is not, part of the law. Now, whatever element of 'ascertainment' or 'declaration'--real or constructive --may generally go (or be deemed by law to go) to make up judicial pronouncements on the law, it would seem fairly clear that there is a cognitive function exercised at least in the recognition of instruments as enactments flowing from a law-making authority. This being the case, every court whose function involves the application of statute law is by that very fact exercising a function of 'judicial review', though in systems where the courts are rather a fonction judiciaire than a justice souveraine, the scope is obviously likely to be minimized. British courts, therefore, no less than American, are every day engaged in the judicial review of legislation: it was not without reason that Dicey perceived the exceedingly English common-law character of American judicial review.[1] But though they are universally recognised as doing so when they consider whether to rule negatively on purported exercises

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1. Dicey, Law of the Constitution, 10th ed. (London, 1961) p.151; and at p.158, 'The legal duty therefore of every judge, whether he act as a judge of the State of New York or as a judge of the Supreme Court of the United States, is clear. He is bound to treat as void every legislative act, whether proceeding from Congress or from the state legislatures, which is inconsistent with the Constitution of the United States. His duty is as clear as that of an English judge called upon to determine the validity of a by-law made by the Great Eastern or any other Railway Company...'

of 'subordinate' legislative power, they are less universally understood to be so acting when they apply Acts of Parliament: hence the 'parliamentary sovereignty' controversies about (i) the extent to which the courts are entitled to refuse to recognise purported laws (purported 'Acts of Parliament') as being such, on grounds of failure to conform to the criteria or rules respectively by law established for the recognition of, or passage of, a law, or the law in question; (an Act of Parliament, or the Act in question); (ii) the character and content of such rules or criteria; (iii) the power of Parliament to change by law such rules; and the consequences thereafter for purported enactments not conforming to the new rules or criteria, though perhaps satisfying the old.

Criteria are indispensable if enactments are to be recognised as such and applied; and it is merely a matter of degree whether (i) at one extreme, one accepts as law any instrument bearing certain formal characteristics (certain words, certain signatures) or issuing from a certain source (as, any instrument coming forth from the fold of a body of men for the time being in de facto occupation of a certain public building, or of certain public records, or of certain other public property: seals, arsenals, or other indicia of power) or having by all appearance the above characteristics; or (ii) at the other extreme, one systematically and rigorously enforces every rule laid down by laws prescribing the legislative process, to impose complete legal continuity.

Implicit, then, in the need to recognise and apply enactments is a judicial review of purported enactments. This judicial review must always be total in the sense that there is no half-way house between recognising the enactment and not recognising it as such--no compromise between acceptance and rejection--and degree enters only as regards the elaborateness of the criteria for acceptance. To say that judicial review is logically inevitable is, of course, to say that he whose business it

is to apply enactments cannot abdicate the function of recognising them; to abdicate decision thereon to another is to be left with the necessity of deciding whether a decision thereon does indeed proceed from that other person or body to whom it was sought to abdicate judgment. The problem is one of legal existentialism; and it extends, in a sense, to the testing and control of all other acts or purported acts of public authority, and beyond them to the acts of all persons whatsoever.[2] The study of 'parliamentary sovereignty' cannot be pursued in isolation from the de facto officer.[3]

II LEGAL CONTINUITY AND LEGAL REVOLUTION

All lawmaking otherwise than in accordance with the law is, doubtless by definition, a legal revolution; a legal discontinuity; where the new cannot trace its continuity from the old; cannot base its title to legitimacy on the old, but amounts to a fresh start. When the discontinuity occurs in the enactment and application of a carrot regulation, the discontinuity will be thought of as an irregularity or illegality; when the discontinuity touches more proximately the legislative process itself, there is in law a revolution in the constitution.

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2. See the recent and brilliant study of Amnon Rubinstein, Jurisdiction and Illegality (Oxford, 1965).

3. See, for example, the very intriguing case of Hall v. Hall (1944) 88 Sol. Jo. 383, wherein the validity of the Probate Act, 1857, was challenged as never having received valid royal assent since the royal succession had not been legitimate since James II. His Honour Judge Roope Reeve, K.C., scarcely did the argument justice; he held 'that he could not ignore a statute which had been acted upon for upwards of eighty years. If the statute was really invalid, as the defendant suggested, Parliament would pass an Indemnity Act ...' See also, for instance, Alan Wharam, "Treason in Rhodesia" [1967] Camb. L.J. 189; A.M. Honoré, "Allegiance and the Usurper" [1967] Camb. L.J. 214.

The latter, no less than the former, may, of course, be utterly unaccompanies by political revolution. It may not occur to anyone that any illegality has occurred, and the processes of governments may appear to be flowing orderly as an untroubled stream; yet something done or omitted may in law be so drastic as later to produce a constitutional crisis of major proportions. Thus, in Pakistan[4] in the years following independence, the Assembly functioned under the Indian Independence Act both as a Legislature and a Constituent Assembly. It was assumed (contrary to advice) that, though when acting in the former capacity royal assent to bills was required, none was needed in the latter capacity for the enactment of constitutional changes and, after an initial period when the Governor-General was also President of the Constituent Assembly and, as such, signed its Acts, no royal assent was given. Constitutional changes without royal assent were later found invalid; with enormous repercussions, for the assembly's composition itself, being largely chosen under invalid laws, was itself invalid; and so, therefore, was a large portion of the courts, public bodies, and laws of Pakistan.

Only by upholding retrospective royal assent could the courts cure the legal discontinuity. Yet these discontinuities, when they occurred, amounted, together with subsequent government by illegal legislature, executive bodies, and courts, to a legal revolution; albeit unaccompanied (for the moment) by political revolution.

Having stated the obvious, and illustrated for good measure, it may be concluded that a system of courts enforcing the law (i) will prima facie have cognisance of the whole, even if restricted to the enforcement of a part; every part having

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4. Sir Ivor Jennings, Constitutional Problems in Pakistan (Cambridge, 1957). Compare Gallant v. The King, [1949] 2 D.L.R. 452 (P.E.I. Supreme Court: Campbell C.J.) on retrospective royal assent.

repercussions on every other; (ii) will have to apply criteria to the recognition of laws; (iii) will have, prima facie, to enforce all strictures of the law, unless in pursuance of some rule characterizing a certain class of law (or of claim or of remedy) and excepting it from the competence of some or all courts.

All law has an impact, more or less proximate or remote, on the lawmaking process; there can be few, if any, spheres where a court, by interpreting the civil or criminal law, will not more or less closely affect, for example, the qualifications of members of a legislative body or the executive or government; for example, every part of the civil law will have an impact on the solvency of such a person. There is, therefore, no a priori difference between constitutional and other law; and even single constitutional instruments can be shown to depend referentially on the rest of the law. Thus, (1) if there is no a priori difference between constitutional and other law--i.e., law regarding the legislative process and law not regarding it, then there is no natural division of the law which invites courts, in the absence of specific enactment, to refuse, on principle, to have cognisance of and apply a certain portion. (2) The attribution of the function of applying the laws, means, prima facie, ALL the laws. (3) The attribution of the function of applying the law means, necessarily, only the laws and not the pretended laws; obedience to public authorities does not mean usurped authority; and an oath of loyalty to a constitution is not an oath of loyalty to those who overthrow the constitution.

To suggest that a system of law recognises as law that which is not law is to stigmatize that system with impossible and self-contradictory nonsense. It is, with respect, not true to say, as Geoffrey Marshall[5] seems to have suggested,

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5. Parliamentary Sovereignty and the Commonwealth (Oxford, 1957) p.5. '[A]ttempts, if they are attempts, do not break down on logical impossibilities.'

that attempts do not break down on logical contradictions; they do; for that which is logically contradictory does not succeed in getting done, but something else. There are three situations worth considering.

(a) Without proceeding to the absurdity of saying that non-law can be law, a system may so far formalize and simplify the criteria for the recognition of law--e.g., certain formula or purported signatures or indicia of official publication on the face of the instrument--as to allow political revolution without any legal discontinuity apparent to the courts. Such, for example, was the position indicated by one of the arguments pressed upon the South African Courts in Harris v. Minister of the Interior[6] unsuccessfully in 1952, but which had been accepted in Ndlawa v. Hofmeyr[7] in 1937 when Stratford, A.C.J., had said, 'An Act of Parliament, in the case of a Sovereign law-making body proves itself by the mere production of the printed form published by proper authority'. The answer to this position, when sought at common law or fixed by statute,[8] is to demonstrate its implications in the most forcible way: by giving effect to any paper put before the Court and professing to be statute law. The undermining effect of such doctrines, subversive of public authority to the extent that they are admitted, is obvious.

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6. 1952 (2) S.A. 428 [A.D.].

7. 1937 A.D. 229 at 237.

8. The South Africa Act Amendment Act, 1956 (No. 9 of 1956), which represented the ultimate legislative success of the government against the entrenched clauses, provided by s.2 that 'No court of law shall be competent to enquire into or to pronounce upon the validity of any law passed by Parliament other than a law which alters or repeals or purports to alter or repeal the provisions of section one hundred and thirty-seven or one hundred and fifty-two of the South Africa Act, 1909.' This may have sought to establish the position accepted by Stratford, A.C.J. But the condition it presupposes is that the instrument be accepted as a 'law passed by Parliament'.

(b) Nor need we necessarily be guilty of the illogicality of admitting non-law as law, if, in the framework of the system, we include further rules regulating the making of law--even rules whose violation entails nullity--but exclude these from the competence of the courts to enforce.[9] In such a case the courts are being completely excluded from the enforcement of part of the law. But if such a position is logically possible, it is highly repugnant to the principles of the English common law, and helps to explain the strong resistance to allowing the rules of the Houses of Parliament to be considered 'law'; since the Courts do not exact compliance with them as a condition to the due passage of a bill they prefer not to describe them as law. The courts have been excluded from enforcement of certain conditions laid down by the Parliament Act, 1911 and 1949, for legislation thereunder, even though these conditions are clearly law;[10] it is not suprising that the conservative opposition of the day singled out the conclusivity of the Speaker's certificiate as a feature obnoxious to them.[11]

Going further still, it is presumably logically possible to have a system attributing legal authority to whoever has power to enforce his will. Even here, however, it would be necessary to distinguish long-run and wide power (the state) from short-run and narrow power (the criminal). This is rather the rule of a primitive tribe than a modern state; and even where such principles decide who amongst the elite in a dictatorship will seize or succeed to power, the case is surely better described rather as one of successive revolutions than one of a legal system whose rule is the seizure of power by force.

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9. Quaere, how far they must also be deprived even of notice.

10. Parliament Act, 1911, 1 & 2 Geo. 5, ch. 13 (U.K.).

11. See, for example, Sir Ivor Jennings, Parliament, 2nd ed. (London, 1957) p.420.

Soviet legal writers who insist on the 'legality' of revolution are thus rather conducting propagnada than propounding analysis.

This last case may clearly be disregarded. We have, accordingly, the situations a) where the only requirements laid down by law for a valid enactment are a minimum of formal criteria--certain signatures or purported signatures; and b) where the law lays down more, but these are excluded from the competence of the courts. We may, however, disregard, for practical purposes, case a), not only because this is embraced as a particular case of b), but also because the formal criteria, however conclusive they may be, will almost invariably be treated as evidentiary in nature: thus, many may argue that the Clerk's roll is conclusive on the Courts that Queen, Lords, and Commons have duly assented to a bill; probably no one will suggest that there is no more requirement in the law of England for lawmaking than that the Clerk makes an Act by enrolling a bill certifying the concurrence of Queen, Lords, and Commons.

Let us, then, consider the enforcement of alw governing the lawmaking process in the British Commonwealth in England and abroad.

III PARLIAMENTARY SOVEREIGNTY AND ENFORCING LEGAL CONTINUITY IN ENGLAND

Dicey's Law of the Constitution was, to several generations of Englishmen, introduced to constitutional law, what Walter Bagehot's The English Constitution was to those becoming acquainted with politics. It was a comprehensive account and interpretation, brilliantly conceived, excellently written, easily read. Like the latter, it achieved an enormous and dominating influence. The salient features pointed out by Dicey on the constitutional landscape--rule of law, parliamentary sovereignty, constitutional convention--became the guideposts of generations of lawyers and judges to whom Dicey was the principal, if not the only, interpreter of English constitutional law. It coincided with the prevailing school of positivist jurisprudence, that of Austin;

perhaps they were both part of a more general current of postiivist philisophy.

In important respects, however, Dicey's work was more marked in the greatness of its synthetic conspectus than in the rigour of its analytic structure. In particular, it may be said that parliamentary sovereignty as expoùnded by Dicey was not consistent with his principle of 'the rule of law', insofar as by suggesting that Parliament could do all, save bind its successors, he meant that Parliament was not free to redefine by statute the lawmaking process, or meant that the laws which might from time to time be in force governing the lawmaking process need not be obeyed.

The author, unkind enough to use a review of a recent excellent textbook[12] to deliver himself of opinions on a series of controversial points, had occasion thus to press the viewpoint that Dicey and his school, following Austin, have implicitly based the analysis of Parliament on an anology between Parliament and an omnipotent human person. As a human person cannot stop himself so Parliament cannot stop itself from changing 'its mind, and could competently restrict 'its' freedom (or that of its successors) only by a complete 'abdication' to a 'new sovereign'. The author has thought it perhaps of some use to put in the following way the paradox which seems to confront those who:

> wage holy war in the name of Dicey against the view that Parliament could validly enact any constitutional changes involving "Parliament binding itself" (or, "its successors"). A conceptual structure generally goes along with this article of faith: (1) Parliament is not seen as a complex legal structure relating (at least) about sixteen hundred persons to each other, but rather, as an "it", a continuing person, (or a succession of persons, each Parliament being one, stepping into the shoes of "its" predecessors), or possibly a continuing thing, perhaps a leviathan of behemoth; unable (following Austin) to stop <u>it</u>self from changing

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12. Of J.D.B. Mitchell, <u>Constitutional Law</u> (Edinburgh, 1964); reviewed in (1966) 44 <u>Can. Bar Rev.</u> 364; parliamentary sovereignty is discussed at p. 367 ff., and the quotation is taken from pp. 372-3 n.

its mind; (2) the terminology about binding ceases to have a merely metaphoric use; indeed, the horrible noises of "it" (Parliament) like Marley's ghost clanking in chains through the pages of law journals and treatises, obfuscates precise thinking and intimidates the unbeliever.

The neo-Diceyite position, at its best, will accept that Parliament, the lawmaking authority, can validly alter its own structure, and thereby redefine the lawmaking process, but will insist that Parliament cannot legislate so as to create a vacuum. That is a reasonable rule; and it is also susceptible of precise formulation, perhaps something roughly like this: "Parliament cannot validly legislate so as to provide that there exist during some finite time some rule of law, actual or formulable, for which there does not exist any legislative process whereby that rule can be enacted." The rule against binding as just formulated is meaningful; and, though there is a great difference between formulating a rule meaningfully and accepting it as a rule of the common law, there would, one would think, be no good objection to treating it as such since the creation of a vacuum is doubtless highly undesirable.

But the rule against "binding" is always understood by the Diceyites to proscribe considerably more than mere vacuums. Often it is understood to prevent constitutional changes which would produce rules of law unchangeable save by processes more "difficult" than those of simple legislation by the Crown, a majority of Lords, and a majority of Commons--so that an entrenched Bill of Rights, for instance, could never be effectively enacted. In wilder moments, the rule against binding has been supposed to mean that there are no legal formalities whatever conditioning the mode in which the hundreds of persons composing Parliament must act to produce valid legislation: Stratford, A.C.J. in Ndlwana v. Hofmeyr, 1937 A.D. 229 at p.238. Sometimes it is suggested that an instrument in possession of the Clerk of the Parliaments, purporting on its face to be an Act of Parliament, is conclusive: if so, the United Kingdom must in law helplessly submit to a maniac who compels the Clerk at the point of a gun to certify a purported act investing him with supreme powers; see Opinion by Professor E.C.S. Wade, reproduced as Appendix II in Geoffrey Marshall, Parliamentary Sovereignty and the Commonwealth (Oxford, 1957). As regards Professor H.W.R. Wade's suggestion, [1955] Camb. L.J. 172, at p.193; (see also Yardley, Source Book of English Administrative Law (1963), p.3), that legislation under the Parliament Acts is really delegated legislation rather than the product of an amended legislative process, it must be observed that (1) such enactments are regarded and treated as acts of Parliament, not subordinate legislation; (2) if the 1911 Parliament Act was a delegation, Lord Hewart, sensitive as he was to such things, was unaware of the full horrors of delegation in England; and the 1949 Act, being on Professor Wade's hypothesis a subdelegation,

(or, at least, a change by the delegate in the terms of the delegation, which is equally bad) must have set Lord Hewart spinning in his grave, at this greatest of all outrages against the maxim delegatus non potest delegare. Indeed, on Professor Wade's hypothesis, the 1949 Act is probably ultra vires.

Any admission, however, that Parliament is free to redefine and reconstitute the lawmaking process apparently renders meaningless any rule against "binding" which goes beyond prohibiting the creation of vacuums. Ex hypothesi the right to reconstitute and redefine has been conceded, and any "binding" can be readily cast in the form of a reconstitution or redefinition. Therefore, it is hard to see how any form of constitutional change can be thought incompetent, apart from violating the rule against vacuums. Or, at least, it is hard to see how any rule can be formulated which distinguishes permissible redefinition and reconstitution from forbidden "binding". The rule against vacuums can be formulated as suggested above; no one has yet shown that he can formulate a stronger rule against binding which admits what must be admitted: namely, a power in Parliament to reconstitute and redefine the lawmaking process. How can even the power to impose a mandatory referendum for valid legislation be denied, when imposing its close equivalent would require nothing more elaborate than taking a path pointed out a century ago by Walter Bagehot in The English Constitution (1872), making every man and woman in the United Kingdom a peer?

Accordingly, the Diceyites have never formulated their supposed rule against "binding" so as to distinguish (permissible) reconstitution and redefinition from (impermissible) "binding". They have not, it is submitted, because they cannot; they cannot because meaningless propositions cannot be meaningfully formulated. The rule that "Parliament cannot bind itself" (or, "its successors"), if it means more than that there shall be no vacuums, but yet concedes the power to reconstitute Parliament, is, so far as I can see, internally inconsistent, and, in truth, no rule at all, simply a crude metaphor, treating Parliament--a legal structure--as analogous to a human person, who of course cannot bind himself from changing his mind or changing his will. "Parliament" being viewed as a single personality is supposed to be the same "it"--or a successor "it" in the same shoes--after any change in composition or constitution as "it" was beforehand; and therefore, on this reasoning, the same "it" after "it" was bound in "its" fetters as "it" was beforehand; being omnipotent, "it" can break "its fetters". In truth, of course, there is no "it", no "person", no "fetters" and no "binding".

The controversies over 'parliamentary' or 'legislative' sovereignty have given rise to a literature on the subject which, for English law, must be considered large, or even, depending upon how far one defines the field to include Commonwealth problems and literature--which to a good degree it necessarily must--even enormous.[13] They have also given birth to a very substantial, and steadily increasing, body of case law.[14]

It is beyond the scope of this discussion to review the whole of either literature or case-law; one may, however, be pardoned for indicating wherein, on each, not a little remains to be considered.

If Dicey be not one of the 'high priests' of the sovereignty mysteries,[15] this must surely be only because he is reserved for higher estate as its latter-day prophet; a conjecture confirmed by the spectacle of judicial 'explanation' of the letter of his scripture to reach a result opposite to its spirit. To see this one need only refer to the series of opinions written by the judges of the New South Wales Supreme Court in Trethowan's Case,[16] opinions which, unfortunately blushing unseen in the shadow of the judgments of the appellate

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13. References to the literature may be found most recently collected in O. Hood Phillips, Constitutional and Administrative Law, 4th ed. (London, 1967), esp. Chapters 3, 4, 33, 35, and Appendix; and there is an extensive bibliography in Geoffrey Marshall, Parliamentary Sovereignty and the Commonwealth (Oxford, 1957). See also, for some unusual authorities, R.F.V. Heuston, Essays in Constitutional Law, 2nd ed. (Oxford, 1964), Ch. 1.

14. Extensive collections of references will be found in the works cited ante note 12; to which may be added most recently Kariapper v. Wijesinha [1967] 3 All E.R. 485 (P.C.).

15. R.F.V. Heuston, (1951) 33 J.C.L. 116; cited by Marshall, Parliamentary Sovereignty and the Commonwealth (Oxford, 1957) p.46.

16. (1930) 31 S.R. (N.S.W.) 183.

tribunals, are in many ways the most interesting of all. If one had not already met student insistence that the late South African cases were entirely reconcilable with Dicey both in letter and spirit, one might be surprised to encounter the following in the judgment of Ferguson, J.[17]

> 'Reliance is placed by the defendants on the principle that Parliament cannot by legislation shackle its own legislative power, or that of its successors. Dicey, in his "Introduction to the Study of the Law of the Constitution", says: "That Parliaments have more than once intended and endeavoured to pass Acts which should tie the hands of their successors" is certain, but the endeavour has always ended in failure. (7th ed., p.62). There seems to be no doubt as to the soundness of the general proposition, at least as applied to a sovereign Legislature such as that of Great Britain; but even in that case it is essential to bear in mind exactly what the proposition means. It does not mean, as I understand it, that it is beyond the power of the King, with the assent of the Lords and Commons, to pass an Act to-day which it is impossible for the King, with the assent of the Lords and Commons, to repeal to-morrow. To-morrow there may be no Lords and Commons, or rather, those two estates may not compose the Parliament of to-morrow. What I conceive to be the true rule is that the sovereign Legislature of to-day, however constituted, cannot pass a law which the equally sovereign Legislature of to-morrow, however it may be constituted, cannot repeal.'

And it is striking to see that to Ferguson, J., it was a non-"sovereign" legislature whose power to entrench effectively was to be doubted, a power which <u>he</u> thought <u>clear</u> in the case of a "sovereign" legislature;[18] while to Owen, J., it was on the contrary the "<u>sovereign</u>" legislature whose power to entrench was to be doubted, and a power of entrenchment, if any, to be

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17. <u>Ibid.</u>, at p.207.

18. <u>Ibid.</u>, and immediately following, his Lordship says: 'There may be a question how far that rule applies to a Legislature which is not a sovereign legislature, but which derives its authority and its very existence from the authority of the Imperial Parliament...' 'We have at our hand an example of a subordinate Legislature which can pass laws so as to restrict the law-making power of its successors.'...At p.208, 'We are not an independent State, and our Legislature is not a sovereign Legislature. Whatever power it may have, it is a power which it must have derived in some way from the

supported rather by showing that the legislature in question was not truly "sovereign".[19] So, in the result both judges affirmed the effectiveness and validity of the entrenchments; Ferguson, J., it would seem, because the Legislature of New South Wales was sufficiently sovereign; Owen, J., because it was sufficiently subordinate. And Ferguson, J., defended the common result in language as forceful as any to be found in any opinion on that cause in any of the three courts.[20]

Imperial Parliament. Beyond question, it would have been competent for the Imperial Parliament, when it bestowed a constitution on New South Wales, to include in it the very provision we are now considering. Without doing that, it might, by the express terms of the covering Act, have given the Colonial Legislature itself power to amend the constitution by inserting that provision. Or again, it might have conferred the power of amendment in such wide terms as to include a power to make this amendment. In either of those cases, once the provision was enacted it would become an unchallengeable part of the constitution, and it would not be competent for the Colonial Legislature to pass any law in conflict with it.'

'There is, therefore, no general principle of law which makes it inherently impossible for the Legislature to possess the power to pass an enactment in the form sub-s. 6. What we have to consider is whether the authority conferred on it by the Imperial Parliament is wide enough to include such a power.' This, he thought, was so.

19. At p.213: 'It has been said in argument that the Parliament of this State is a sovereign power, and that Parliament cannot make laws relating to the Constitution which bind the same or a subsequent Parliament; in other words, that Parliament, as a sovereign power, can repeal any Act relating to the Constitution already in force. With these contentions I agree, but subject to important limitations. The Parliament of this State is given sovereign powers within and controlled by the terms of the written Constitution then in existence...'.

20. At p.208: 'I do not think that question is answered by showing the extravagant results that might follow if the Parliament, having passed an Act, has power to provide that any Bill repealing it is not to become law until it has been submitted to a referendum. It has been urged upon us that Parliament might with equal force claim the right to provide that the repealing Bill should be submitted to Tattersall's Club, or that three years should elapse after its introduction before it should finally become law. But under any reading of the constitution it is conceded that the Legislature might do things quite as drastic. It might lawfully abolish one House of Parliament, or possibly both, create a third House, or thirty, extend the franchise

Though it is beyond the scope of this discussion to engage in an extensive review either of the judicial authorities on the subject, or of the discussion by the learned authors, one is surely warranted in seeing in the seminal power of R.T.E. Latham;[21] in the authority of Sir Ivor Jennings[22] who now, alas, may be cited in court; in the pedagogical force of the witty and erudite R.F.V. Heuston;[23] and in the exhaustive scholarship and meticulous analysis of Geoffrey Marshall,[24] the buoys of a current of learned writing which has surely superseded Dicey on the subject of legislative sovereignty. Marshall, in particular, has exposed the weakness in Dicey's reasoning, and pointed out the unwarranted character of the assumption that there must by unalterable English law or logical necessity be a sovereign, in Dicey's sense,--a single omnipotent body; and one cannot over-emphasize the absurdity of personifying a complex legal structure and then supporting conclusions as to its necessary legal character from the supposed analogy of the human person. Yet the influence of Diceyite doctrine is not yet spent; its defenders are influential,[25] and one must

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to every man, woman and child in the State old enough to hold a pencil, restrict it so that nobody should have a vote or sit in Parliament except young women between fifteen and eighteen, or provide that after the next dissolution there should be no further election for twenty years. If any such Act were passed by both Houses, and received the Royal assent, it would be part of the law of the land. All that means is that there is nothing in the constitution forbidding the Legislature to do insane things...' .

21. 'The Law and the Commonwealth' (1949); a reprint of a piece in W.K. Hancock, Survey of British Commonwealth Affairs, Vol. I (1937).

22. The Law and the Constitution, 5th ed. (London, 1959).

23. Essays in Constitutional Law, 2nd ed., (London, 1964), Ch. 1.

24. Parliamentary Sovereignty and the Commonwealth (Oxford, 1957)

25. Professors E.C.S. Wade, H.W.R. Wade, and Mr. D.C.M. Yardley, noted ante, p 309 and in slightly lesser degree, Professor O. Hood Phillips.

expect recourse to it by those who in any given circumstances wish to take either (i) a restrictive view of the power of the courts to enforce the law respecting the processes of lawmaking, or (ii) a restrictive view of the power of the legislature to change that law, [ie., in the common phrase, 'to bind itself' or 'to bind its successors'].

Sir Ivor Jennings has perhaps epitomized the modern view of the English law about 'parliamentary sovereignty' and the regulation by law of the lawmaking process, in his phrase, 'The law is that Parliament may make any law in the manner and form provided by the law.'[26] Where Dicey[27] saw 'parliamentary sovereignty' as much in terms of a limitation on the competence of the courts as in terms of the unlimited legislative competence of the (United Kingdom) Parliament, the better modern authorities emphasize the latter, insisting that the courts must in general enforce the laws prescribing the lawmaking processes as they would any other laws, and that Parliament (or other competent lawmaking authority, if we are not specifically speaking of the United Kingdom) may by law alter those processes. These principles are indeed implicit in the duty of the courts to notice and apply the law to matters before them: purported enactments made by those who do not by law enjoy the power to make them, do not form part of the law, and cannot be noticed or applied as part of the law. This is no assertion of a special power to quash; to annul; to set aside; to expunge; this is no claim of a special jurisdiction. It is merely a denial that there is some special exception whereby claims to power must be treated as lawful powers; usurped authority as authority; illegal acts as legal; revolutionary acts as acts of the existing legal order attacked by them; and legal discontinuity as continuity. To treat even a simpler legislative process (like the United Kingdom Parliament), not as a complex legal structure involving hundreds of persons and

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26. W. Ivor Jennings, The Law and the Constitution, 3rd ed., (London, 1943), p. 144.

27. A.V. Dicey, Introduction to the Study of the Law of the Constitution, now in 10th edition, (London, 1959).

existing only *in abstracto*, but rather as an omnipotent human person who cannot help himself from changing his mind or bind himself in fetters, is, at best, to become ensnared in one's own crude metaphors, and, at worst, to indulge in metaphysical claptrap. Problems, no doubt, exist. When is the appropriate sanction absolute nullity, or an injunction, or a penalty, or something else? What rules are to be considered constitutive of a legislative body, and which merely of a lesser character? When will things be presumed to have been properly done, and how strong will that presumption be? (Were a maniac to force the Clerk of the Parliaments to certify, at gunpoint, a purported act vesting the maniac with supreme powers, there are many who would re-examine the doctrine that the Parliament roll is conclusive as being the record of a court, and who, disinclined to the view that United Kingdom law obliges obedience in the circumstances, would find hitherto unsuspected resources in the plea (or argument directed to judicial notice) *nul tiel record*. But whatever problems there be, the author is convinced that the principles above stated are the only ones logically consistent with the body of English law and that of the British Commonwealth in general; and that they are indeed merely corollaries or applications of "the rule of law". Historical instances of successful revolutions do not prove that they were not revolutions; even if judges, happily or reluctantly, went along with the revolutions. Legal discontinuities are not legal continuities because judges refrain from broaching the subject. Nor are political calculations as to the likely malleable behavious of judges in a revolutionary situation any indication of - and still less conclusive of - what is or can be prescribed by *law* under the *present* legal order as being necessary for lawmaking.[28] There *is* law which governs the lawmaking processes; it *is* applied and enforced; it is from time to time altered; when it is altered the new law displaces the old. In England, the

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28. Compare H. W. R. Wade, 'The Basis of Legal Sovereignty', [1955] Camb L.J. 172 with Jennings, op cit., 5th ed. (London, 1959) p. 137 ff. and especially p. 318 ff., and Marshall, Parliamentary Sovereignty and the Commonwealth (Oxford, 1957), especially at pp. 43-46.

Parliament Act, 1911, provided for legislation, on certain conditions, by Crown and Commons; which latter legislative process was so far considered to produce fully-fledged Acts of Parliament that the process was used to enact the Parliament Act, 1949, which removed in part the conditions imposed by the Act of 1911 - something unthinkable for a mere delegate.

Of the nature of the judicial enforcement of the law respecting the lawmaking processes, this must be added. Those unsympathetic to such enforcement can be expected to speak of it as the exercise of a special or nominate power or jurisdiction[29] whose exercise serves to annul or invalidate[30] -- that is, to operate in some sense against an antecedently valid res -- even when they are capable of fairly stating and being clearly aware of the true basis on which judicial enforcement is asserted[31]. In truth, of course, Courts asserting the right to enforce the law respecting the lawmaking processes have always insisted that they are merely noticing and applying the law as in all other cases. As one counsel daily urges, and another denies, that a certain proposition is part of the common law and thus part of the general corpus of the law, so here does one counsel urge, and another deny, that a rule laid down in a purported enactment forms part of the general corpus of the law. The matter is as simple as that. Far from invalidating anything, the judicial decree ought not in principle to contain any statement at all of the law even by way of declaring the nullity of the purported statute; for the law cannot be res judicata inter partes.

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29. Thus Hood Phillips, for example, says 'Apart from these "entrenched clauses" the Union Courts never had power to declare Acts of the Union Parliament void as being unconstitutional": Constitutional and Administrative Law, 4th ed. (London, 1967) p. 831. Or at p. 8 'Those who frame a rigid Constitution seem to be placed in a dilemma. They may give the power to interpret the Constitution, and to declare legislation invalid as being repugnant thereto, to the Courts....'. At p. 26, speaking of the U.K., 'The Courts have therefore no power to "review" Parliamentary legislation and to declare it unconstitutional.' See also pp. 52-3, 56, and 75. Emphasis added.

30. Ibid., p. 832: 'Until the Separate Representation of

Yet even the friends of the judicial enforcement of the rules governing lawmaking --- those who most closely perceive the true juridical nature of the matter[32]--- can speak in terms of a specific 'jurisdiction'[33]to review, or even of the annulment' of an Act[34], and of remedies directed rather to the question of law raised in the case than simply to whatever relief the party happens to be entitled to according to the nature of his cause of action,[35] and quite independently of the pure question of law involved.

What is more remarkable still is that Courts determined to enforce the law in the face of the greatest pressures, Courts with every interest in resisting the imputation that they are assuming a special sort of jurisdiction, or 'annulling' or 'invalidating' statutes ---- Courts in short with the highest interest in an absolutely meticulous set of legal proceedings --- proceedings, indeed, preferably, which disclose on their face not a single word of law from beginning to end --- even such courts will give countenenace to the contentions of their adversaries. Thus the report of Harris v. Minister of the Interior[36] discloses that the decree of the Court issued in the following terms: 'Order granted in terms of prayer (a) of the applicant's notice of motion; respondents to pay the costs'.[37] And prayer (a) had sought'(a) an order declaring that the measure known as Act 46 of 1951 is invalid, null and void and of no legal force and effect in terms and by virtue of secs. 35

Voters Act 1951 was invalidated by the Supreme Court ...'; [emphasis added].

31. Ibid., p. 9 'It is not strictly accurate to say that the Courts declare legislation void: when cases are brought before them judicially, they may declare that an alleged right or power does not exist or that an alleged wrong has been committed because a certain statute relied on is unconstitutional.' The court order does not declare the law; does not therefore declare the purported statute void; and a fortiori does not invalidate.

32. R. F. V. Heuston, Essays in Constitutional Law 2nd ed., (London, 1964) p. 10: 'There are no doubt certain foreign countries where this is so--- excess of legislative authority is regarded as a matter between the legislature and the electors. But this has never been the English view. With us the constitution is a matter of private, not of public, law.'

and 152 of the South Africa Act,1909, as amended.'[38] How exposed this left the position of the Court is obvious from the text of the subsequent High Court of Parliament Act[39] which purported to provide by section 2 that:

> '... any judgment or order of the Appellate Division of the Supreme Court of South Africa .... whereby the said Appellate Division declared or declares invalid any provision of any Act of Parliament referred to in section one or whereby it declared or declares that any such Act is not an Act of the Parliament of the Union, or whereby it refused or refuses to give effect to any provision of such an Act or prohibited or prohibits any person from giving effect to any such provision or in any other manner rendered or renders such a provision inoperative or denied or denies that it has the force of law shall, subject to the provisions of this Act, be subject to review by the High Court of Parliament ... constituted as hereinafter provided.'

By refusing to allow its proceedings to bear any mark of the grounds in law upon which any given order was made the Appellate Division would have gone far in frustrating the operation of the High Court of Parliament Act. For the South African Parliament would have been obliged in effect to create and keep in existence a new court of perfectly general appellate jurisdiction, available to hear causes of every description which should be pressed upon it with the claim that the cause had been decided below --- by any court --- on legal grounds refusing effect to purported parliamentary legislation. Indeed, the Appellate Division might have been spared the need to stretch the law in the High Court of Parliament Case[40] --- as it plainly did, in order to find that Act ultra vires; seeing that the entrenched clauses imposed ex facie no restrictions on the power of Parliament, functioning ordinarily, to create courts.[41]

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33. Ibid., p. 7: 'The courts have jurisdiction to question the validity of an alleged Act of Parliament [on grounds of composition or procedure]'.

34. Ibid., p. 15: 'The court annulled the Act on the ground that it contravened sections 35 and 152 of the South Africa Act, 1909, the entrenched sections ...' [emphasis added].

35. Ibid., p. 7: 'This jurisdiction is exercisable either before or after the Royal Assent has been signified --- in the former case by injunction, in the latter by way of declaratory judgment.' As has been suggested ante, an injunction will never be available simply because the enactment resulting from the bill would be null --- there must also be a specific legal wrong; and a declaration of right is not a

The Appellate Division would surely have been instead far more justified in responding: "reverse our orders if you will; but neither we nor any other court in the Union will take your view of the law, for that would be inconsistent with the entrenched clauses. And we warn you that we will consider as void all elections from which coloured voters have been unlawfully excluded; and void all legislation passed by the Union Parliament with the aid of illegally elected members, or which might not have been passed if legally elected members had been present and voted against the bill. If you disregard our view of the law the result will be chaos, for illegality will quickly infect all manner of public acts, and permeate every sort of litigation. And you will be constantly engaged in the functions of an appellate court inspecting all our decrees to decide if they would have been decided otherwise were your professed laws given effect to."

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declaration of law, and so will not be available simply to declare that a purported enactment is void. See Buck v. A.-G., [1965] Ch. 745 [C.A.].

36. 1952 (2) S.A. 428 [A.D.]

37. 1952 (2) S.A. 428 at p. 472

38. 1952 (2) S.A. 428 at p. 472: similarly in the High Court of Parliament Case, Minister of the Interior v. Harris, 1952 (4) S.A. 769 at 779 and 785 [A.D.]

39. Act No. 35 of 1952 (Assented to 3rd June, 1952.) Section One defined 'Act of Parliament' as an instrument enrolled or to be enrolled with the Registrar of the Appellate Division, in terms of s. 37 of the South Africa Act,1909, 'by virtue of the fact that it purports to be an Act of Parliament, and which purports to be enacted the King, the Senate and the House of Assembly' whether in joint or separate sittings and irrespective of the subject matter thereof.

40. Minister of the Interior v. Harris, 1952 (4) S. A. 769 [A.D.]

41. It is submitted that there was probably no difference in principle between the High Court of Parliament Act and the Senate Act; as the latter was sustained in Collins v. Minister of the Interior, 1957 (1) S.A. 552, despite its motive, so should have been the former.

Such then is the attitude which, it is submitted, 'strict logic and high technique' would have indicated. It amounts simply to pressing with great care and complete consistency to their logical conclusion the ordinary rules governing notice and application of the law: the contents of invalid purported enactments do not form part of the law. Any breakdown in legal continuity which may result can be cured by the Crown, the source of all public authority, just as it summons a legislature in a territory first settled. In Jennings' phrase[42]:

> '... there can never be a lacuna in the Constitution of an independent country under the Crown. on the margin the powers of the Crown are deliciously vague, the draftsman's dream of the blanket clause that covers everything he has forgotten or cannot foresee. If all else fails the Queen is the Constitution, for every power that is not vested in somebody else must be vested in her'.

though this may be thought to leave open the question of de facto possession of the Crown[43], and, in general, the problems of the effect to be given by the Courts to acts of de facto government, short of/plainly the Courts 'joining the revolution'; problems lately to the fore in Rhodesia, and elaborately discussed in the cases decided by the Rhodesian "courts" sub. nom. Madzimbamuto v. Lardner-Burke[44]. Of the gymnastics performed at first instance[45] and in the Appellate Division of the 'High Court, Rhodesia'[46] to justify admitting the revolutionary constitution illegal but enforcing it anyhow, it is sufficient to suggest that they

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42. Constitutional Problems in Pakistan (Cambridge, 1957) p.72

43. A.M. Honoré, "Allegiance and the Usurper" [1967] C.L.J. 214; Hall v. Hall,(1944) 88 Sol. Jo. 383

44. Reported in pamphlets published by the Government Printer, Salisbury (1966 and 1968).

45. Lewis J.

46. Beadle, C.J.; Quénet, J.P.; Macdonald, J.A.;Jarvis and Fieldsend JJ. A.

suffer from the same fallacy as the ontological proof of the existence of God. By this proof, the meaning of God is made to include his existence, and from this (universal) definition the (existential) conclusion is drawn that God exists. Similarly, if it is said that a legal order must require or at least excuse obedience to those wielding effective power, simply because effective or general control is essential to the meaning of government and law, the answer is simple: a rejection of the applicability of such a definition of 'government' at the margin (especially as regards option in revolutionary circumstances) --- or else a reply that, if that is what is meant by 'government' or 'law', the legal order which insists on allegiance can simply be called by some other name. Something more than definition is required to bring unicorns into being. And hundreds of pages of historical and legal materials do not get rid of the fact that it is sought to derive an ought from an is: a bootstrap operation.

IV. THE IMPERIAL SUPREMACY AND THE STATUTE OF WESTMINSTER

(1) Repugnancy

The Colonial Laws Validity Act, 1865[47], 'in Imperial history clarum et venerabile nomen',[48] arising from the famous South Australian controversies,[49] was represented by its title as 'An Act to remove Doubts as to the Validity of Colonial Laws',. was prefaced by a preamble of like purport, and was framed largely in declaratory terms.[50] Described by Dicey as '[t]he charter of colonial legislative independence',[51] Keir and Lawson, for their part, have in their memorable phrase observed that 'The Act is not and was never intended to be a Colonial Laws Invalidity Act'.[52] These well-known remarks select as the chief features of the Act its declaratory and liberal character; liberal in leaving repugnancy to imperial statutes extending to the colony, in company with the somewhat uncertain rule against extraterritorial legislation, as the sole limitations upon the local legislative power.

How far the Act did in truth represent the common law would, one might suppose, no longer be a matter worth bothering about. But the Statute of Westminster[53] in 1931 abolished application

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47. 28 & 29 Vict., c.63 (U.K.). For a general account see Wheare, The Constitutional Structure of the Commonwealth (Oxford, 1960).

48. Per Lord Birkenhead, L.C., in McCawley v. The King [1920] A.C. 691 at 709.

49. An account, with references, is given in Berriedale Keith, Responsible Government in the Dominions (Oxford, 1928) I, 339 ff. See also, generally, Roberts-Wray, Commonwealth and Colonial Law (London, 1966) 396 ff.

51. The Law of the Constitution, 10th ed. (London, 1961) 105.

50. See sections 3, 4, and 5.

52. Cases in Constitutional Law, 4th ed. (Oxford, 1954) 475.

53. 22 Geo. 5 ch.4 (U.K.).

of the Colonial Laws Validity Act to laws made in future by the Parliament of a Dominion,[54] defined for this purpose to include the laws of the Canadian provincial legislatures.[55] Though nothing in the Statute of Westminster was to 'apply to the repeal, amendment or alteration of the British North America Act, 1867 to 1930, or any order, rule or regulation made thereunder'--a saving clause probably necessary to safeguard the Canadian federal constitutional structure,[56] but of little-noticed paradoxical consequences if taken literally,[57] (and in any case of uncertain extent and meaning)--still, the Colonial Laws Validity Act, 1865, was well and truly repealed as to Canada, to a large extent at any rate. Would this then mean, for example, that instructions by the Crown regarding assent to, and reservation of,bills, deemed directory by section 4 of the Colonial Laws Validity Act, might now be imperative, so as to

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54. Section 2.

55. Section 7 (2).

56. Sir Kenneth Wheare's argument contra, in The Constitutional Structure of the Commonwealth (Oxford, 1960), 65 ff., at 68-9, is based on the probably correct premise that the rules defining classes of subjects would have remained in force and their infringement would still have entailed ultra vires. But one of the classes of federal legislative competence is the residuary clause including all matters not falling within provincial classes of subjects. And the rules in the B.N.A. Act itself,defining spheres of competence,cannot be said to be a provincial legislative subject matter. Must they not therefore be within the federal residuum of subject matter? This would be the consequence of strict application of the principle that, so far as subject matter is concerned, there is no lacuna under the B.N.A. Acts: A.-G. Ont. v. A.-G. Can., [1912] A.C. 571. If that be so, only the repugnancy rule, saved by s. 7 of the Statute of Westminster, protects the B.N.A. Acts. The present author's conclusion amounts to saying that, on the hypothesis that a boundary line must fall within one or other territory, it is within the residual territory.

57. Section 7 of the Statute of Westminster saves the British North America Acts; but section 129 of the B.N.A. Act, 1867, saves the repugnancy rule (at least as regards Imperial statutes extending to Canada in 1867). A circle? No. The statute of Westminster prevails: Nanaimo Community Hotel Ltd. v. Board of Referees,[1945] 3 D.L.R. 225;affirming [1944] 4 D.L.R. 638.

operate limitation of a Governor's authority and consequent nullity of a statute assented to through misunderstanding or flouting of instructions? The problem might easily arise in a Canadian province where the Lieutenant-Governor is instructed by the Governor-General. Sir Kenneth Roberts-Wray[58] prefers Mr. Justice Boothby's view that violation of instructions (at least when instructions were envisaged and obedience enjoined in an Imperial statute) entailed invalidity, to the contrary view of the law officers that instructions were a matter between Crown and servant only; but it is submitted that the difference *prima facie* between commission and instructions is that the one confers and limits power, and the other directs the manner of user; and that *this* is the effect of the words of the Privy Council in *Cameron* v. *Kyte*[59] holding that a governor had been given no authority to use the power of prerogative legislation to effect a quasi-legislative reduction of the fees of a public officer, and adding:

> 'If a Governor had, by virtue of that appointment, the whole sovereignty of the Colony delegated to him as a Vice-roy, and represented the King in the Government of that Colony, there would be good reason to contend that an act of sovereignty done by him would be valid and obligatory upon the subject living within his government, provided the act would be valid if done by the Sovereign himself, though such act might not be in conformity with the instructions which the Governor had received for the regulation of his own conduct. The breach of those instructions might well be contended on this supposition to be matter resting between the Sovereign and his Deputy, rendering the latter liable to censure or punishment, but not affecting the validity of the thing done. But if the Governor be an officer, merely with a limited authority from the Crown, his assumption of an act of sovereign power, out of the limits of the authority so given to him, would be purely void...' .

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58. *Commonwealth and Colonial Law* (London, 1966) p.402; see also pp.147-8.

59. (1835) 3 Knapp P.C. 332; 12 E.R. 678; the passage quoted is at p.343.

This, it would seem, is, for our purposes, a distinction not, as Sir Kenneth suggests, between viceroys and governors, but between instruments empowering and instruments instructing. For their Lordships had just concluded that[60]

> 'the question is reduced to this single point, whether or not such an authority as was exercised in this case can be implied. It is not pretended by the appellant, that the Governor had by his commission or instructions any authority of this nature expressly communicated to him';

and this, while of course showing that instructions can confer power, turned the question purely into one whether the King by commissioning a governor had entrusted him virtute officii with the requisite power; and it was on the hypothesis that, contrary to their view, the governor had the power from this source--the only source left open--that their Lordships would have, they said, been prepared to treat negative instructions as directory only. They were not saying that instructions to a Viceroy are directory and to a Governor imperative, but that instructions to one to whom power is duly communicated are probably directory.

Here, then, the Colonial Laws Validity Act seems declaratory. Was it so as regards the conditions under which colonial laws might be invalid as in excess of authority? Was it so on the great question which principally gave rise to the 'doubts' for the quieting of which the Colonial Laws Validity Act was particularly enacted? Could it be said that, even before that Act, colonial laws would not have been void merely for repugnancy to 'the law of England'--or to some portion of that law which could be said to consist of fundamental principles? The matter was, of course, deeply controverted;[61] but the rule as stated by the law officers just before the Act, 'liberalised,

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60. At p.342. Emphasis added.

61. The authorities are collected in Roberts-Wray, op.cit., p.400 ff.

if not much simplified, by limiting it to the "fundamental" laws of England',[62] seems supported principally, as regards judicial authority, by Lord Mansfield's dictum in Campbell v. Hall;[63] and this, after all, concerned a power of legislation by the sole authority of the Crown against persons who, if conquered, had, after all, become subjects of the King: the power to legislate in respect to subjects, new and old, is surely highly exceptional.

Though the Statute of Westminster took care, in section 2, to ensure that nullity for mere repugnancy to English law, which had been wiped away by sections 2 and 3 of the Colonial Laws Validity Act, should not reappear with the repeal of the latter, one may still conceive of circumstances in which the problem might re-appear. For the benefit of this rule goes to the Dominion Parliaments and the Canadian provincial legislatures: but it is conceivable for the problem to arise squarely in respect of the dependent territories of the Dominions themselves.[64] Thus, in Australia the Northern Territory acquired, effective from January 1st, 1911, from the State of South Australia, by the Commonwealth, is under a legislature created by the Commonwealth Parliament with powers to make ordinances for the 'peace, order and good government of the Territory' but which is only partly representative; this legislature has, however, been assimilated by the Courts to those enjoying local 'sovereign'

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62. Ibid.

63. 1 Cowp. 204; Lofft. 665; 20 St. Tr. 239. Compare, however, In re Zaghlul Pasha (1923) 68 Sol. Jo. 382 (P.C.: Lords Haldane, Dunedin, Atkinson, Sumner, and Wrenbury), where an Egyptian was, as a political act, detained without reasons by prerogative authority in Gibraltar, where the Crown enjoyed legislative power. Leave to appeal from an order of the Chief Justice of Gibraltar dismissing an application of the nature of habeas corpus, was refused.

64. See the Royal Proclamation of January 12, 1948, by Rt. Hon. G.B. Van Zyl, Governor-General of the Union of South Africa, annexing to the Crown in right of the Union, Marion Island and Prince Edward Island. Reproduced in May, The South African Constitution, 3rd ed. (Cape Town, 1955), Appendix 26, p. 557.

status subject under the[Colonial Laws Validity Act]only to repugnancy to Imperial legislation; and, in R. v. Lampe; Ex parte Maddalozzo,[65] the well-known cases of Reg. v. Burah,[66] Hodge v. The Queen,[67] Powell v. Apollo Candle Company[68] and Riel v. The Queen[69], were cited and their wide dicta on sovereign powers quoted and applied, even though there is no Australian analogue of the Colonial Laws Validity Act. It ought to be added that the power challenged in the case was the power of delegation by the Legislature--scarcely on any view a violation of fundamental principles.

Even before the Colonial Laws Validity Act, 1865, Baron Parke could speak in the famous case of Kielley v. Carson[70] of the Crown's power of 'creating a local legislative assembly, with authority subordinate, indeed, to that of parliament, but supreme within the limits of the colony for the government of its inhabitants'; and, indeed, when Willes, J., spoke for the Exchequer Chamber in Phillips v. Eyre[71], he said, before mentioning the terms of the Act of 1865, in an almost certain reference to the common law position:

> 'We are satisfied that it is sound law, and that a confirmed act of the local legislature lawfully constituted, whether in a settled or conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the imperial parliament.'

The Act of 1865, once law, left no room for repugnancy as a cause of invalidity [the colonial statute being 'void and inoperative'], unless to an imperial statute extending expressly or by necessary implication to the colony; though it is still to be decided how far repugnancy operated ultra vires or permanent repeal of a colonial law; and how far it merely left the colonial law inoperative during the period of repugnancy so as to allow it to revive (or spring to life for the first time)

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65. (1963), 5 F.L.R. 160 (Supreme Court of the Northern Territory: Bridge, J.).

66. (1878) 3 App. Cas. 889.

67. (1883) 9 App. Cas. 117.

if the Imperial statute were repealed.

(2) Extent of Constitutional Amendment Powers

It is submitted that, at common law, and in the absence of the Colonial Laws Validity Act, the local legislature, whether representative or not, would in principle have enjoyed a power to make laws for the peace, order, and good government of the territory; and that this would have included power to legislate with respect to the local institutions of government; subject, of course, to any reservation of such prerogative authority as might have existed, in those cases where reservation was necessary because representative institutions had been granted. That a power to legislate for the peace, order and good government of a territory would carry with it a power to legislate with regard to the local constitution was, however, doubted by the Privy Council in Chenard v. Arissol,[72] where Lord Reid said for the Board[73] that:[74]

> 'A power to make ordinances for the peace, order and good government of a colony does not authorize alteration of the constitution or powers of the colonial legislature, but it does authorize the enactment of rights, privileges and immunities whether these be general or in favour of particular persons or classes of persons.'

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68. (1885) 10 App. Cas. 282.

69. (1885) 10 App. Cas. 675.

70. (1841-2) 4 Moo. P.C. 63 at 84; said to have been conceded at Bar.

71. (1870) L.R. 6 Q.B. 1 at p.20.

72. [1949] A.C. 127.

73. Lord Simonds, Lord Uthwatt, Lord Morton of Henryton and Lord Reid.

74. At p.132.

It appears, however, that this dictum was directed particularly to legislatures not being representative legislatures within the meaning of the Colonial Laws Validity Act; for, representative legislatures would enjoy these powers directly from that Act, since its enactment, and they would not therefore be envisaged by the Board. Indeed, their Lordships emphasized that even non-representative legislatures might obtain from other sources--presumably express grant--the same powers of constitutional amendment that, by section 5, the Colonial Laws Validity Act gave to representative legislatures:

> 'The purpose of s.5 is to confer rights, not to take them away. No right is conferred by s.5 on any non-representative legislature to make laws respecting the constitution, powers or procedure of that legislature, and it may be that few, if any, non-representative legislatures have power to make laws which directly affect their own constitution, powers or procedure, but, if any such legislature has power from another source to make laws which touch any of these matters, those powers are not affected by the Colonial Laws Validity Act, 1865.'

So far as representative legislatures are concerned, it seems clear that before the Colonial Laws Validity Act not a little of their legislation--on subjects like representation in the Assembly, and so forth--must have been embraced in the definition 'constitution, powers and procedure'; if their power was limited at that time in the way the Privy Council suggests, much of it must have been invalid; which seems doubtful. In the case at Bar their Lordships held that an enactment declaring members privileged from defamation actions and prosecutions was not a law respecting 'constitution, powers and procedure' of the legislature[75] as contrasted with the privileges of individual members.

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75. At p.133. Compare Fielding v. Thomas [1896] A.C. 600, where s.5 of the Colonial Laws Validity Act was thought 'sufficient for the purpose' of making provision for the privileges of the Nova Scotia Assembly. (pp.382-3). And at p.383: 'It surely cannot be contended that the independence of the provincial legislatures from outside interference, 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...'

But the Act itself--admirably drafted though it was--created difficult problems. Did the Act attribute powers of constitutional amendment to representative legislatures notwithstanding that, by certain laws in force in the colony, certain powers of constitutional change might be excluded from the competence of these legislatures?

A negative answer could confidently be given where the entrenching or limiting provisions still left open a 'colonial legislature' [defined by s.1 of the Colonial Laws Validity Act to mean 'the Authority, other than[76] the Imperial Parliament or Her Majesty in Council, competent to make Laws for any Colony'] competent to make the constitutional change in question. Indeed, compliance with such provisions could be said to be compliance with laws prescribing manner and form of legislation, required by section 5 itself.[77] Would the negative answer still be good if there were no such colonial legislature competent--that is, no process other than the Imperial Parliament or the Queen in Council competent to make the change in question? Surely that was squarely within the words of the Colonial Laws Validity Act giving power to the local representative legislature?[78] Yet if section five gave the power to change the local constitution, would not section two--the rule against enacting laws repugnant to Imperial statute--safeguard those constitutions at least which were contained in Imperial statutes? Imperial statutes, like the B.N.A. Act, enacted after the Colonial Laws Validity Act, 1865[79] would seem almost certainly to override the constitutional amendment powers given by the latter Act--less clearly

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76. Emphasis added.

77. A.-G. N.S.W. v. Trethowan [1932] A.C. 526.

78. Sed quaere the intention.

79. 28 & 29 Vict., c.63 (U.K.); assented to 29th June, 1865.

so Imperial Statutes enacted prior to the Colonial Laws Validity Act. Just this, for example, was the paradox which faced New Zealand until 1947,[80] for the powers of constitutional change granted by the Colonial Laws Validity Act, 1865 competed with the restrictions imposed by the earlier Imperial statute of 1852 upon the constitutional amendment powers of the New Zealand General Assembly.[81] There is some authority that the Imperial statute, whenever enacted, must prevail, as contrasted with 'colonial restrictions'.[82]

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80. New Zealand Constitution (Amendment) Act, 1947, 11 & 12 Geo. 6, ch.4 (U.K.); assented to 10th December, 1947. It provided: '1. It shall be lawful for the Parliament of New Zealand by any Act or Acts of that Parliament to alter, suspend, or repeal, at any time, all or any of the provisions of the New Zealand Constitution Act, 1852; and the New Zealand Constitution (Amendment) Act, 1857, is hereby repealed.'

81. By 'An Act to amend the Act for granting a Representative Constitution to the Colony of New Zealand', 20 & 21 Vict., c.53; assented to 17th August, 1857, the General Assembly was empowered to 'by any Act or Acts from Time to Time to alter, suspend, or repeal all or any of the Provisions of the said Act, except such as are herein-after specified; namely [here followed a list of excepted matters]'; and there followed certain requirements of reservation for the Queen's pleasure.

82. In the dissenting judgment of Isaacs and Rich, JJ., in McCawley v. The King (1918) 26 C.L.R. 9 (High Court: Griffith, C.J., Barton, Gavan Duffy and Powers, JJ., Isaacs, Higgins and Rich, JJ., dissenting); approved by the Privy Council on appeal in the following words of Lord Birkenhead, L.C., [1920] A.C. at p.701: 'Isaacs and Rich, JJ., delivered one of two judgments dissenting...and with it their Lordships find themselves in almost complete agreement; indeed, if it were not for the general constitutional importance throughout the Empire of the matters under discussion, they would have been content to leave the matter where these learned judges left it'; Isaacs and Rich, JJ., said, at pp.50-51:

'It is (inter alia) contended that sec.5 must be read so as to be consistent with sec.2. So far we entirely assent. Then the contention proceeds that by sec.2 no colonial Act can stand if it is in conflict with an Imperial Act whenever passed. Again we assent, with this addition: that the provisions of the Imperial Act relied on must still be in force. The next step in the contention is that sec.2 preserves all the legal restrictions on the colonial legislatures as those restrictions existed when sec.2 was passed. Here we part company with the contention. Whatever colonial [emphasis added] restrictions existed immediately prior to the passing of the Colonial Laws Validity Act must yield to the later will of the Imperial Parliament as expressed in sec.5. That section according to all recognized

More difficult to settle was the impact of section five of the Colonial Laws Validity Act on a reservation by the Crown in a prerogative instrument of authority [and especially exclusive authority] to make constitutional changes. The Crown's reservation could not, in such case, claim to prevail, as could an Imperial statute, by virtue of the repugnancy rule. Could a local representative legislature then insist that, whatever its 'charter' might say, it could look to the powers granted by section five of the Colonial Laws Validity Act, and disregard the restrictions contained in its 'charter'?[83] To treat the Crown's reservation as a 'manner and form' requirement is to fly in the face of the provision by section five that a representative legislature shall enjoy powers of constitutional amendment; for the Queen in Council is by definition not a colonial legislature[84]

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rules of construction works an implied repeal of every prior enactment with which it is inconsistent. The repugnancy to a former Act of a later Act competently passed is fatal to the earlier one.'

'At the moment, therefore, of the passing of the Colonial Laws Validity Act, 1865, sec.5 was, so far as its language extends, an absolute Charter, no matter what the British Legislature had previously said. It is as if the Imperial Parliament had said: "Notwithstanding anything contained in or omitted from the Constitutional law of any colony, be it enacted" &c. But sec.2 does operate to this extent, that if by any later British legislation any provision is made repugnant to sec.5, then that section must pro tanto give way to the later legislation. And if in those circumstances a colony legislates repugnantly to the later enactment, sec.2 operates to avoid the colonial legislation so far as it is so repugnant.'

'In the present case ... the contention has no relevance. It is endeavoured to apply to sec.2 of the Act the provisions of the Queensland Constitution Act of 1867. That is not an Imperial Act, order or regulation; and that ends the matter.'

83. Admittedly the Crown would itself be part of the representative legislature and thus prevent the amendment from being enacted; but its function as head of the local legislature would usually be delegated to its governor, who could on the foregoing hypothesis assent to a constitutional amendment despite a reservation of constitutional amendment power to the Crown alone or in Council.

84. In section 1: 'The Terms "Legislature" and "Colonial Legislature" shall severally signify the Authority, other than the Imperial Parliament or Her Majesty in Council, competent to make Laws for any Colony'.

and therefore not a representative legislature,[85] and so the orders of the Queen in Council cannot be the manner and form in which a representative legislature acts. The choice is to flout the terms of the charter or the terms of the Colonial Laws Validity Act.

(3) Manner and Form

Other problems arise from the famous 'manner and form' requirements of section five. First, will compliance with 'manner and form' prescriptions be universally necessary even though the Colonial Laws Validity Act speaks in terms only of compliance with such rules in the case of laws dealing with the Judicature and the constitution, powers, and procedure of the Legislature? The answer to that, surely, is, as we have already emphasized, that obedience to the law governing the lawmaking processes in no way depends upon the Colonial Laws Validity Act,[86] a proposition whose most significant recent exposition is to be found in the judgment of Lord Pearce for the Privy Council in 1965 (for the 'high priests of the mystery' yearly lose ground to the canons of construction') in Bribery Commissioner v. Ranasinghe[87] holding that:

> '...a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign, as is the legislature of Ceylon, or whether the Constitution is "uncontrolled," as the Board held the Constitution of Queensland to be. Such a Constitution can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with: and the alteration or amendment may include the change or abolition of those very provisions. But the proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said

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85. In section 1: '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'.

86. Per Centlivres, C.J., in Harris v. Minister of the Interior

> shall not be a valid law unless made by a different type of majority or by a different legislative process...' ,

and again that:[88]

> 'No question of sovereignty arises. A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, e.g., when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the Constitution there is only a bare majority if the Consitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority.'

Moreover, even if a law is not in terms addressed to the elements of the legislative process, it may still, if it provides for certain requirements in respect of valid lawmaking, still be, in force if not in form, a law dealing with the constitution of the legislature.[89]

1952(2) S.A. 428, at pp.460-2, and 464.

87. [1965] A.C. 172 at 197-8. Privy Council: Viscount Radcliffe, Lord Evershed, Lord Morris of Borth-y-Gest, Lord Hodson, and Lord Pearce.

88. Ibid., at p.200; see Geoffrey Marshall, "Parliamentary Sovereignty: A Recent Development", (1966-7) 12 McGill L.J. 523.

89. Dicta in McCawley v. The King (1918) 26 C.L.R. at p.54, per Isaacs and Rich, JJ., suggest that there are two conditions on the powers given in section 5: '(1) the law must, as to subject matter, answer the description, and (2) it must have been passed in "manner and form" as required by the law of the colony relating to the passing of laws...'. This, it is submitted, does not mean that the manner and form requirements apply only to laws dealing with Legislature and Judicature, but rather that the special powers given by section five only apply to those subjects; and, when these powers do apply, then do also the manner and form requirements--but not only then.

But what, indeed, is a law prescribing manner and form? A provision which subjects a matter or class of matters to a special or distinct process of lawmaking clearly relates to manner and form. This includes, for example, a referendum requirement, whether superadded to the usual conditions of legislation: A.-G. N.S.W. v. Trethowan,[90] or substituted for some part of those conditions: Clayton v. Heffron;[91] a requirement of a special majority in one or more houses[92] or of a reservation of a bill for the signification of the Queen's pleasure;[93] and a requirement of passage by two-thirds in a joint session of two houses, in place of a usual requirement of passage by each of the two houses: Harris v. Minister of the Interior.[94] It covers, in sum, 'the entire process of turning a proposed law into a legislative enactment, and was intended to enjoin fulfillment of every condition and compliance with every requirement which existing legislation imposed upon the process of law making.'[95]

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90. [1932] A.C. 526 (P.C.).

91. (1960) 105 C.L.R. 214 (High Court of Australia); Taylor v. A.-G. of Queensland (1917) 23 C.L.R. 457 (High Court of Australia).

92. Per Isaacs and Rich, JJ., in a dissenting judgment in McCawley v. The King (1918) 26 C.L.R. 9 at 54, approved by the Privy Council on appeal: [1920] A.C. at 701; ante note 78.

93. Ibid.

94. 1952 (2) S.A. 428 at 461; though its operation was, in the circumstances, held superfluous.

95. Rich, J., in A.-G. N.S.W. v. Trethowan (1931) 44 C.L.R. 394 at 419; expressly cited and approved by Lord Sankey, L.C., for the Privy Council in [1932] A.C. 526 at 541. Conversely, the power under s.5 of the Colonial Laws Validity Act, when validly exercised enables the abolition of one or more of the elements, as, for example, the Upper House: Trethowan's Case; and Taylor v. A.-G. of Queensland (1917) 23 C.L.R. 457.

A measure of conflict has arisen as to the application of this principle to the case where law exists, more especially law embodied in an enactment of constitutional stamp, declaring, for example, (i) that a certain thing shall not be done, or (ii) that the Legislature shall not do a certain thing; there being, nevertheless, no special mode prescribed in which this law may be changed, in any way different from the usual manner of law-making.

Especially in situation (i), the case seems overwhelmingly in favour of holding that subsequent inconsistent legislation effects an implied repeal of the 'constitutional' provision. Yet, in Cooper v. Commissioner of Income Tax for the State of Queensland, a majority of the Australian High Court,[96] (while holding that State income tax legislation was not inconsistent with provisions in the State Constitution Act in substance declaring judicial salaries secure from reduction,) stated (also) that the power of the legislature 'to make laws altering or repealing all or any of the provisions' of the constitution 'in the same manner as any other laws for the good government of the Colony',[97] in the words of Griffith, C.J., 'did not authorize the legislature, while the provisions of the Constitution remained unaltered, to make any law inconsistent with it.'[98] His Lordship added,[99] 'I think that, if the legislature desires to pass a law inconsistent with the existing Constitution, it must first amend the Constitution. This would be done by a

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96. (1907) 4 C.L.R. 1304; Griffith, C.J., Barton, O'Connor and Isaacs, JJ.; Higgins, J., expressing no opinion.

97. There were certain immaterial exceptions.

98. (1907) 4 C.L.R. 1304 at 1314. Emphasis added.

99. At p.1315.

Bill for that purpose, to which the attention of the legislature and the public would be called, and the passing of and assent to which would obviously depend upon considerations very different from those applicable to an ordinary law passed in the exercise of the plenary powers of the legislature under the existing Constitution.'[100]

Where a safeguard is drawn in terms of a prohibition directed against, or a limitation placed upon, the legislative authority, one has at least the argument, in favour of the point of view of the Cooper Case, that prohibited action remains unlawful until the prohibition is repealed, and that a limitation remains effective until the limitation is repealed. One would advance this argument, for example, against an attempt to extend beyond five years the maximum duration of the life of the United Kingdom Parliament, were this undertaken by Crown and Commons alone; for Crown and Commons are, by s.2 of the Parliament Act, 1911, denied authority to make such a change by themselves,

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100. Sir Edmund Barton, J., said, (1907) 4 C.L.R. 1304 at 1317, 'The legislation of a body created by and acting under a written charter or constitution is valid only so far as it conforms to the authority conferred by that instrument of government. Therefore attempted legislation, merely at variance with the charter or constitution, cannot be held an effective law on the ground that the authority conferred by that instrument includes a power to alter or to repeal any part of it, if the legislation questioned has not been preceded by a good exercise of such power, that is, if the charter or constitution has not antecedently been so altered within the authority given by that document itself. Hence an implied repeal is not within the power to alter or repeal, and is not valid because it is not an exercise of legislative power. It is only when the instrument is altered upon the authority collected from its own terms that it becomes the new charter or constitution, and the confinement of subsequent legislation within its altered bounds, be they narrowed or widened, becomes in turn a condition precedent to the validity of that legislation.'

'Legislation, which could not be undertaken at all without the antecedent authority of the fundamental law, cannot overstep the bounds set for it by that law and yet stand good. Before it can avail, the bounds must have been lawfully extended. That is a condition precedent, even if the makers of the disputed law had power to make the extension themselves. They cannot omit to make it, and at the same time proceed as if it had been made.'

O'Connor, J., at p.1328 likewise distinguished a power to 'repeal or amend' from 'the entire abolition of any binding form of Constitution or the entire disregard of its provisions.'

Isaacs, J., at p.1329 agreed with Griffith, C.J.

though they appear competent to remove the restriction and then make the change. So, too, under the Regency Act, 1937,[101] the Regent, who lacks power inter alia to assent to a Bill altering the succession to the Crown, seems competent, nevertheless, to assent to a Bill amending the Regency Acts. One can thus argue that the relevant restrictions or prohibitions must in each case be repealed before the prohibited or restricted action is taken; though as the time between the two steps--(1) assent to the bill removing the restrictions; (2) assent to the bill altering the succession or the life of Parliament--can decrease without limit to zero and thus is, in principle, nil, one is forced to the conclusion that there is not even a limitation in time; but merely a requirement of the correct ordering of stages of a lawmaking process which, at most, will require two distinct bills successively assented to[102], but possibly only two successively operating rules in a single bill.

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101. 1 Edw. 8 & 1 Geo. 6, ch.16, s.4(2).

102. Doyle v. Attorney-General for New South Wales [1934] A.C. 511, a neglected case, suggests that the material date will usually be that of royal assent. Since rules governing the lawmaking process usually speak in terms of what bills may be assented to and what laws may be enacted, the relevant date for testing compliance with the conditions imposed for lawmaking will ordinarily be, not the times at which the bills were introduced or went through different stages, but the time of assent, or the time of enactment (which is ordinarily equivalent to assent). A bill which at that time meets the tests then in force, can thus become law on receiving assent. The retrospective provisions of the Parliament Act, 1949; 12, 13 & 14 Geo. 6, ch.103 (Assented to 16th December, 1949), may thus have been superfluous.

The effect of the Doyle case may be explained as follows. A bill providing for machinery for the election of legislative councillors had passed both houses of the New South Wales Parliament, but could not have become law even had it received royal assent, because it had not been put to the referendum required by law as a condition of constitutional changes in the Legislative Council. It was, in fact, not presented for royal assent, but was followed by another bill to reform the Legislative Council, by substituting for life appointment a twelve-year term to which a councillor would be elected by an electoral college consisting of the two houses in joint session voting by proportional representation. This latter or reform bill was approved by a referendum and duly received royal assent. It was held by the Privy Council that, as the reform act, which had first received assent, contained a section allowing for machinery to be provided by law, without referendum,

But the constitutional guarantee considered in the Cooper case was not even framed in terms of a prohibition upon or restriction of legislative authority; it merely stated a rule about judges' salaries. There seemed no very good reason why a competent legislature should have, before making contrary provision, first to repeal expressly the existing rule; or even to mention the existing rule in the repealing statute, if one accepts the validity of implied repeal of statutes. Accordingly, Wessels, J.A., in Krause v. Commissioner for Inland Revenue[103] took the view that, whether the income tax was or was not a diminution of salary, the provision in section 100 of the South Africa Act, 1909[104] that judicial remuneration 'shall not be diminished during their continuance in office' could not be treated as dominant over a later statute, since '[i]f a later Act of Parliament is inconsistent with the South Africa Act, the Court may hold that the later Act impliedly varies such part of the South Africa Act as is inconsistent with the later Act. The Court cannot say that Acts of Parliament must be so interpreted as to conform to the South Africa Act and that no other interpretation is admissible.'[105] Justices Curlewis,

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the machinery bill might validly receive royal assent and thereby become law immediately after the reform act, notwithstanding that it had not passed through all its stages after the reform act became law.

Per Lord Tomlin for the Privy Council [1934] A.C. 511 at 520: '...[it was contended] that the law according to which the elections of members must be conducted must be a law, every step in the process of enacting which must have occurred after the Reform Act became law, and that the Machinery Act does not satisfy this description and therefore cannot be relied on as the law regulating the conduct of such elections.'

(At p.522), '...[T]heir Lordships are of opinion that the Machinery Act having received the Royal Assent after the Reform Act, exactly satisfies the words "as may be provided by law"... and that notwithstanding that the Bill for the Machinery Act may have passed both houses before the Reform Act received the Royal assent...'

103. 1929 A.D. 286 (Appellate Division of the Supreme Court of South Africa: Wessels, Curlewis, and Stratford, JJ. A., and J.E.R. de Villiers, A.J.A.)

104. 9 Edw. 7, ch.9, (U.K.); Assented to 20th September, 1909.

105. 1929, A.D. 286 at 290.

Stratford, and De Villiers, however, were content to find that the income tax was not a reduction of remuneration within the meaning of the South Africa Act, and did not discuss the power of implied repeal.

Whatever be the difficulties which it created, Lord Birkenhead's exposition for the Privy Council in McCawley v. The King[106] doubtless furnishes the locus classicus for the power of a legislature, when competent to effect the express repeal of a constitutional provision, to do so by inconsistent legislation, without either first removing the constitutional provision, or even expressly mentioning it at all. That case considered the competition of a provision in the Queensland Constitution Act prescribing judicial tenure in the Supreme Court during good behaviour, and a state statute which on its true construction was held to provide that judges of the state's Court of Industrial Arbitration, who were appointed to that court for seven-year terms, should, but only during their tenure of that office, be judges of the state Supreme Court. The legislation to this effect did not expressly refer to the Constitution Act at all, but, as we observed in Cooper's Case,[107] the Queensland Legislature was quite competent to change the Constitution 'in the same manner as any other laws for the good government of the Colony'.

Lord Birkenhead's fundamental distinction was that between[108] a 'controlled' constitution, defined to mean 'constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation', and 'uncontrolled' constitutions, those 'constitutions [which] can only be altered with some special formality, and in some cases by a specially convened assembly.' Elegantly stating the policy

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106. [1920] A.C. 691.

107. Ante, p. 337.

108. [1920] A.C. at 703-4.

of each, his Lordship did good service in pointing out that the distinction was not one between federal and unitary constitutions:[109]

> 'It is not a distinction which depends in the least upon the differences between a unitary and a federal form of Government. The dictum, for instance, of Isaacs and Rich, JJ., that "nowhere do we find in any unitary form of government a provision that the constitutional law must always be first amended" is, if their Lordships understand it aright, too widely stated. Unitary forms of government have, on the contrary, exhibited both ingenuity and resource in providing complicated machinery which required adjustment before the nature of the constitution could be effectively modified',

nor between written and unwritten ones:[110]

> 'Nor is a constitution debarred from being reckoned as an uncontrolled constitution because it is not, like the British constitution, constituted by historic development, but finds its genesis in an originating document which may contain some conditions which cannot be altered except by the power which gave it birth.'

The legal consequences flowing from the 'uncontrolled' status do not really seem to have been supposed to be more than that there be no special process for constitutional lawmaking:

> 'It is of the greatest importance to notice that where the constitution is uncontrolled the consequences of its freedom admit of no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision. Thus when one of the learned judges in the Court below said that, according to the appellant, the constitution could be ignored as if it were a Dog Act, he was in effect merely expressing his opinion that the constitution was, in fact, controlled. If it were uncontrolled, it would be an elementary commonplace that in the eye of of the law the legislative document or documents which defined it occupied precisely the same

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109. Ibid.

110. At p.704. The words technically leave open the possibility of unwritten controlled constitutions.

> position as a Dog Act or any other Act, however humble its subject-matter.'

More particularly, one need not infer that their Lordships meant that the legislature was not competent to make effective law prescribing different and special forms of lawmaking. There is, it is true, a dictum that might serve to support traditional sovereignty doctrines about an inability to impose, or a right to disregard, conditions prescribed for lawmaking:[111]

> 'No attempt has been made in the judgments below, or in the arguments placed before the Board, to deal with the point made by Isaacs and Rich, JJ., that if ss.15 and 16 of the Constitution Act of 1867 are to be construed as depriving the Legislature of the power to legislate upon the subject of the Judicature they are in conflict with the Imperial Act, already referred to, which gives such power in the plainest language.'

That is a reference to the Colonial Laws Validity Act, 1865, and may be said in some measure to countenance McTiernan, J.'s doctrine, enunciated in dissent in A.-G. N.S.W. v. Trethowan[112] that 'Sec.5 of the Colonial Laws Validity Act is an overriding charter which keeps the legislature continuously supplied with plenary power to make laws respecting its own constitution, powers and procedure, and no Act of the legislature can destroy or permanently diminish the authority from which it derives the charter.' Indeed, McCawley's Case was in Trethowan's Case much used by the judges as authority as well against as in support of the effectiveness of the entrenchments there in issue. But insofar as the 'overriding charter' doctrine survived the Privy Council judgment in Trethowan's Case[113] it must be taken to survive in a fashion consistent with the effectiveness of rules prescribing manner and form--a fashion in which the 'overriding charter' becomes merely the statutory equivalent to a common-law rule against the creation of vacuums by the United Kingdom Parliament.[114] Did Lord Birkenhead so intend in McCawley's

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111. [1920] A.C. at p.715; as also the remarks, denying the necessity of express or two-stage repeal of the provisions of the Constitution Act, and adding: 'Their Lordships are clearly of opinion that no warrant whatever exists for the views insisted upon by the respondents, and affirmed by a majority of judges in the Courts below. It was not the policy of the Imperial Legislature, at any relevant period, to shackle or control in the manner suggested the legislative powers of the nascent Australian Legislatures.

Case?

There is internal evidence in his judgment in McCawley's Case[115] that his remarks were in no way directed against the position later adopted by the Board in Trethowan's Case. His Lordship, for example, points out the absence in the constitutional instrument of any provisions, material to the case, making special provisions for constitutional alteration; but he does not say that the Legislature could impose none.[116] He points to one case where indeed the Constitution Act requires a special majority--for interference with the constitution of the Legislative Council[117]--without questioning its validity. His Lordship complains, not that respondents contend that the Queensland Legislature has imposed special procedures for modification of judicial tenure, but rather of their contention

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> Consistently with the genius of the British people what was given was given completely, and unequivocally, in the belief fully justified by the event, that these young communities would successfully work out their own constitutional salvation': [1920] A.C. at p. 706.

112. (1931) 44 C.L.R. 394 at 443.

113. [1932] A.C. 526; the grant in s. 5 was a grant of power sub modo, to be exercised in proper manner and form: per Lord Sankey, L.C., at p. 539.

114. Ante, p. 308 ff.

115. [1920] A.C. 691.

116. [1920] A.C. at p. 705: [Were the constitution 'controlled'] the respondents 'would have no difficulty in pointing to specific articles in the legislative instrument or instruments which created the constitution, prescribing with meticulous precision the methods by which, and by which alone, it could be altered.'

117. Ibid., p. 712: 'We observe, therefore, that the Legislature in this isolated section carefully selecting one special and individual case in which limitations are imposed upon the power of the Parliament of Queensland to express and carry out its purpose in the ordinary way, by a bare majority.'

118. Ibid., p. 713. Emphasis added.

'that they cannot be modified except in some manner of which their Lordships take leave to observe that it is neither clearly conceived, nor intelligibly described'.[118] His Lordship concludes, not that the Queensland Legislature could not impose special requirements for interfering with judicial tenure, rather that 'their Lordships are wholly unable to discern in the language of...the Act of 1867, the slightest indication of an intention on the part of the Legislature to deal in any exceptional manner with legislation affecting judicial tenure in Queensland.'[119] If the Legislature was 'master of its own household', this, too, was sub modo, for it was master 'except in so far as its powers have in special cases been restricted'; and none had been established.[120]

The substance of the decision appears to have been the refusal of the Board to imply, in a statute merely prescribing judicial tenure, a prescription of a special manner and form of legislation to alter that tenure; particularly where the special 'manner and form' said to be required consisted only in successive enactments, or, at any rate, express mention. Thus, his Lordship observed that the respondents were unable to point to 'specific articles in the legislative instrument or instruments which created the constitution, prescribing with meticulous precision the methods by which, and by which alone, it could be altered.'[121]

> 'And their inability has involved them in dialectical difficulties which are embarrassing and even ridiculous. They are, for instance, driven to contend--or at least they did in fact contend--that if it were desired to alter an article of the constitution it was in the first place necessary to pass a repealing Act;

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119. [1920] A.C. 691 at 713.

120. [1920] A.C. 691 at 714. This view of the case has now, it is submitted, received the support of the Privy Council, in Bribery Commissioner v. Ranasinghe [1965] A.C. 172, at pp.196-9. Compare G. Marshall in (1966-7) 12 McGill L.J. 523 at 525.

121. [1920] A.C. 691 at 705.

> and in the second place by a separate and independent Act to make the desired change effective. Counsel for the respondents, in fact, though perhaps unnecessarily, went so far as to maintain that the attempted modification would not be effectively carried out by a single Act, even if such an Act incorporated the provisions of the two Acts which, in his view, required a separate existence.'

Even stating the matter 'more moderately' and 'in a manner more favourable to the respondents', their contention must be:

> 'The constitution of Queensland is a controlled constitution. It cannot, therefore, be altered merely by enacting legislation inconsistent with its articles. It can only be altered by an Act which in plain and unmistakable language refers to it; asserts the intention of the Legislature to alter it; and consequentially gives effect to that intention by its operative provisions.'

Such an inference their Lordships, probably rightly, thought unacceptable:[122]

> 'It must at once be observed that such a constitution as the respondents conceive of would be, so far as the Board is aware, unique in constitutional history. It is neither controlled nor is it uncontrolled. It is not controlled because posterity can by a merely formal Act correct it at pleasure. It is not uncontrolled because the framers have prescribed to their successors a particular mode by which, and by which alone, they are allowed to effect constitutional changes',

though it would be going too far to say that they thought the result one which it would have been <u>impossible</u> for a local legislature to establish. It is, after all, the old tension between an Act inconsistent with a prior Act containing a requirement that the prior Act be given effect against subsequent legislation. This cannot reasonably be held to intend an entrenchment, and the question becomes one of the point at which an implication to repeal is to be inferred.[123]

The problem enjoys a current interest in Canada, not only with respect to the utility or futility of the <u>Canadian Bill of</u>

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122. <u>Ibid.</u>

123. <u>Ellen Street Estates, Ltd.</u> v. <u>Minister of Health</u> [1934] 1 K.B. 590; <u>Vauxhall Estates, Ltd.</u> v. <u>Liverpool Corporation</u> [1932] 1 K.B. 733.

Rights[124] in its present form as a simple federal statute, but also because the power granted by the British North America Act, 1949[125] to the Parliament of Canada enabling it to amend unilaterally large portions of the Canadian constitutional statutes, may survive, if at all, only in a more restricted form;[126] and if so a question may arise as to whether any part of the Canadian constitutional statutes (largely of Imperial origin) have been impliedly repealed while the Parliament of Canada had a power of express repeal.

As to the United Kingdom, McCawley's Case may not support an attempt by a Regent to assent to a single bill both removing the restrictions on his powers of assent and altering the succession,[127] since clauses accomplishing the second part may render the bill a 'Bill for changing the order of succession to the Crown' and so beyond the Regent's powers of assent. So, too, any clauses to accomplish the extension of the life of Parliament beyond five years would render a bill one 'containing any provision to extend the maximum duration of Parliament' and so incapable of enactment by the Crown and Commons alone, even though the bill might contain other clauses removing the restriction, retrospectively or not.[128]

A whole Bill may be vitiated by a single clause whenever an entrenchment is directed at the Bill itself. Better

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124. 8-9 Eliz. II, c.44 (Can.)(1960); see K. Lysyk, Comment in (1968) 46 Can. Bar Rev. 141.

125. 13 Geo. 6, ch.81 (U.K.); (assented to 16th December, 1949).

126. The Fulton-Favreau Formula of 1964, had it been implemented (which it only narrowly failed of being) would by clauses 6 and 12 have replaced the present power (inserted by the 1949 Act into s.91 of the B.N.A. Act, 1867, as head 1) by a more restricted list. The text of the formula may conveniently be found in (1966-7) 12 McGill L.J. at p.579 ff.

127. Ante, p. 338-9.

128. Regency Act, 1937, 1 Edw. 8 & 1 Geo. 6, c.16, s.4(2); Parliament Act, 1911, 1 & 2 Geo. 5, ch.13, s.2(1); ante, p.338-9.

draftsmanship will direct the entrenchment at the provisions proposed to be enacted; and provide instead that : 'No provision [here setting out the entrenched matters]...shall have the force of law unless it is contained in a Bill, which, before it receives the royal assent [here the entrenching rules are set out].' Furthermore, such a form makes it clear that nullity is the intended consequence of non-compliance; while prohibitions against presentation for royal assent leave that unclear, apart from creating other problems.

One may, however, conclude from McCawley's Case that the courts will be slow to infer that a form of entrenchment has been intended consisting simply of action by the same body twice repeated. But provisions setting forth a distinct process of lawmaking--not necessarily more difficult, but different--must, the authorities show, be complied with.

The notion of legal, as distinct from political 'difficulty' is itself deserving of certain observations. A certain procedure may be said strictly to comprehend another, and be more 'difficult', if compliance with the former is ipso facto compliance with the latter, but not vice versa. In a looser sense a procedure will commonly be described as more 'difficult', and as comprehending another, if compliance with the former can reasonably be said to show the possibility of securing compliance with the latter, even if, for one reason or another, further action is technically necessary. (A bill first passed by two-thirds of each house of the United States Congress must still go to the President for approval or veto, even if it is obvious that Congress can override the veto. In that sense the suspensive power may be said to make the process more difficult than the process would be if bills passed by two-thirds on the first occasion did not have to go to the President at all.)

Where neither process wholly includes the other, the two are incommensurable, and neither can be said, in a legal sense, to be more 'difficult' than the other. However much overlap

there may be between the two, the elements which are not common to both can be weighed only politically one against the other, and their relative difficulty judged only by political and other factors quite extraneous to the rules setting out the processes themselves. Thus, in a legal sense, the process of two-thirds majority in joint session, established by sections 35, 137, and 152 (native and coloured franchise, official languages, and the amendment procedure) of the South Africa Act, 1909,[129] is evidently not more 'difficult' than a simple majority in each of the two houses; for it is quite possible to have a two-thirds majority in joint session made up of a minority of one house together with the overwhelming support of the other. This may have been recognized by the draftsmen of these clauses who, possibly because they appreciated that two thirds of a majority in joint session need not imply a simple majority in each house, provided in sections 35 and 152 that a bill passed with the requisite two-thirds majority was to be 'taken to have been duly passed by both Houses of Parliament.'[130]

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129. 9 Edw. 7, c.9 (U.K.); these sections were amended in 1936 by the Representation of Natives Act, No.12 of 1936 (S.A.) and in 1956 by the South Africa Act Amendment Act, 1956 (No.9, 1956).

Section 137 provided for English and Dutch as the Official Languages, for their equality and their official use. Act No.8 of 1925 professed to redefine Dutch, in section 137 and wherever else it occurred in the South Africa Act, to include Afrikaans, with operation from May 31st, 1910, being the commencement of the Union. As this was passed in ordinary manner, as appears from the enacting clause, by the King, Senate, and House of Assembly, semble this amendment was ultra vires quoad s. 137.

The Constitution of the Republic, Act No.32 of 1961, was likewise passed by the Queen, Senate and House of Assembly. The entrenched clauses appear now (without, of course, any coloured voting rights) as section 108 (official languages) and 118 (constitutional amendment). The word Afrikaans now appears in place of Dutch in s.108 as one of the official languages, though in s.119 an omnibus clause makes Afrikaans when used in the Act, include Dutch. It would appear that the substitution of Afrikaans for Dutch is therefore still ultra vires.

130. Until 1955, when the Senate Act, 1955 (Act No.53 of 1955) introduced deadlock rules similar to the Parliament Acts, 1911 and 1949, section 63 of the South Africa Act, 1909, provided for a joint session in which a majority of those present and voting could pass a bill which was then taken to be duly passed by both houses, and could become law on royal assent.

But despite this last provision, problems could still arise from the fact that two-thirds of a joint session does not of itself imply a simple majority of each house. True, there is a rule deeming passage in each house, but that is only a constructive passage, and restricted in scope to the types of enactments envisaged by sections 35 and 152. Situations might arise where it could be argued that the presumptive passage could not apply. Thus, a party desiring to challenge provisions enacted by two thirds in joint session could argue in effect that the provisions so enacted were not such as could be lawfully enacted under that process. He would say that they could be made law only by the normal processes of passage through both Houses by a majority of each. In a sense, such a party would be invoking the processes commonly thought of as 'ordinary', as being the more 'difficult' ones--the protective or entrenching ones. If the court agreed that the provisions of the bill were outside the scope of sections 35 and 152, and if it confined itself to ex facie evidence, it could not say that the bill could have succeeded in passing each house individually. It would thus be ultra vires a joint session.

Such indeed, if not the only, was, it is submitted, the most substantial basis for the challenge in Ndlawa v. Hofmeyr,[131] where the Representation of Natives Act, 1936, was attacked as

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It may therefore be said that the two-thirds of a joint session required by ss.35 and 152 was more difficult than the simple majority of a joint session required for other bills by section 63. However, the deadlock rule of section 63 required (except for money bills) disagreement in two sessions, while the joint session under sections 35 and 152 could be had in one.

One may add that the deadlock clause provides a potent argument for the reasoning that the Parliament of a Dominion in the Statute of Westminster, 1931, meant, in appropriate cases, the Parliament of South Africa in joint session. If it did not, an Act passed in joint session would not benefit from the Statute and would lack the sovereign power of other Acts.

131. 1937 A.D. 229 (Cape Provincial Division: Van Zyl, J.P., Sutton and Centlivres, JJ. Appellate Division: Stratford, A.C.J., De Villiers and De Wet, JJ.A., and Watermeyer, A.J.A.).

ultra vires a joint session (where indeed it had been passed by two-thirds). The careful judgment of Van Zyl, J.P., for the Cape Provincial Division in that case left open, as unnecessary to consider, the question whether sections 35 and 152 remained, despite the Statute of Westminster, 1931, obligatory in the cases to which they applied. He did, however, consider the question whether they could be used to enact Act 12 of 1936, and this he answered in the affirmative. But Ndlwana had not merely argued that the 'entrenched sections had been repealed' by the Statute of Westminster and so could no longer be made use of;[132] he had argued, equally, that the bills fell outside the subject matter of the entrenched sections.[133] Van Zyl, J.P., did hold that the Statute of Westminster had not repealed the entrenched provisions;[134] but he clearly understood that it was necessary also to show that the impugned Act was one whose contents could, by reason of their subject matter, be passed by the method prescribed by those entrenched provisions, for he explained carefully why[135] the Bill could be brought under those sections, and he also took care to hold that ancillary provisions could be included in the Bill without themselves being invalid or rendering the whole Act bad.[136]

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132. 1937, A.D. 229 at 230.

133. 1937, A.D. 229 at 230; in the Cape Provincial Division it was 'in the first place urged that Act 12 of 1936, was ultra vires the South Africa Act in as much as it was passed by a joint sitting of both Houses of Parliament, and is not "such law" as is contemplated by sec.35(1) of the South Africa Act.' [Emphasis added.]

134. 1937, A.D. 230: 'These entrenched provisions have not been repealed or altered by the Statute of Westminster.'

135. 1931, A.D. 229 at 231, explaining that it was a bill for disqualification of natives; at 232, 'It seems to me therefore that sec.35(1) should be construed as meaning that if a bill dealing generally with the qualification of voters contains a provision or provisions disqualifying any person from being registered on the ground of race or colour such a bill should be passed by both Houses of Parliament sitting together.'

The point had been appreciated in R. v. Ndobe, 1930, A.D. 484. There, De Villiers, C.J., for the Appellate

The logical and carefully reasoned judgment of Van Zyl, J.P., in the Cape Provincial Division is in marked contrast to that of Stratford, A.C.J., in the Appellate Division. It is not clear whether the arguments were put in the same way as in the Court below or whether the Appellate Division appreciated their force,[137] but as each head of Ndlwana's argument required that the unicameral process be held, for different reasons, imcompetent, it is clear that Stratford, A.C.J.'s holding that Parliament 'can adopt any procedure it thinks fit', however questionable, is not obiter. This, at least, was appreciated by Centlivres, C.J., in Harris v. Minister of the Interior,[138] who also seemed to appreciate that Ndlwana's case had included the argument that the subject matter of the Act there in question was outside sec. 35 and so ultra vires the unicameral procedure.[139]

Division (himself, Wessels, Curlewis and Roos, JJ.A.) said that to assume that an Act which''deals with matters other than the matters dealt with by sec. 35' has been 'passed by the two Houses of Parliament sitting together as prescribed in sec. 35 would be to assume that the Act was not validly passed.'

136. 1931, A.D. at 232, continuing the passage quoted supra note 131, Van Zyl, J.P., adds: 'Similarly it seems to me that in such a bill any provisions cognate to the principle of such bill may be included.'

What was a cognate provision? To Van Zyl, J.P., the class was wide enough to embrace the provisions dealing with the representation of natives in the Senate, the House of Assembly and the Provincial Councils; elections thereto; and the creation of a Natives Representative Council (a consultative body to which the Minister of Native Affairs could inter alia refer bills which in his opinion specially affected the interests of natives--which bills he could by his certificate compulsorily withdraw from either House of Parliament.)

What, indeed, would be a law which would fall within section 35 as disqualifying voters? In R. v. Ndobe, 1930, A.D. 484 at 491, it was thought that 'it is not necessary that the law should purport to deal with the qualifications of voters in order to bring it within the section.' It was sufficient if a 'provision in a law does in fact deal with that subject'; 'it must conform to the procedure laid down in the sub-section.' It was not clear whether his Lordship meant that any other matter could lawfully be included and passed under that procedure: 'If a provision in a law does in fact deal with that subject, the circumstance that it appears in a law also dealing with other matters would not alter its essential nature'. The Court in that case held that the challenge failed because the Act, passed in the

(4) The Statute of Westminster

The function of the Statute of Westminster, 1931,[140] was, broadly, the conferral of legislative sovereignty on the then Dominions. Legislative sovereignty might readily be seen in two dimensions, those of territorial extent and force of operation.

The doctrine of the territorial limits of the operation of colonial laws, laid down in MacLeod v. A.-G. N.S.W.;[141] was confined in Ashbury v. Ellis;[142] and distinguished, in respect of functions, authorized or countenanced (at any rate by Imperial statute), which could not be reasonably carried on without extraterritorial force being used, as control of aliens: A.-G. Can. v. Cain and Gilhula,[143] or the application of customs laws: Croft v. Dunphy.[144] It was described by Lord Sankey, L.C.[145] as a 'doctrine of somewhat obscure extent', and its paradoxes and inconsistencies have been illuminated--at least as far as paradoxes or inconsistencies may be--by Dr. O'Connell.[146]

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usual way, did not on its face disqualify and would be interpreted in such manner as not to authorize disqualification. What was disqualification? Substituting a new form of land title not good as a franchise qualification would, the court said, be a disqualification. What of confiscating the land? Putting a voter to death by statute? Would these be held to be disqualifications because they would involve the consequence that the native could not vote? The court thought that 'a provision for the devolution of property in a certain way cannot be construed as an alteration of the qualifications of voters.' The consequence that potential heirs or legatees might not be qualified to vote was thus too remote.

137. Written arguments were apparently filed in Ndlwana's Case. See Harris v. Minister of the Interior, 1952 (2) S.A. 428 at 471. It there appears from the judgment of Centlivres, J., that the argument was before the Court that the Statute at Westminster had repealed the entrenched sections.

138. 1952 (2) S.A. 428 at 463; Geoffrey Marshall, op.cit., at 180.

139. 1952 (2) S.A. 428 at 470, citing the remarks of De Villiers, C.J., to that effect in R. v. Ndobe, 1930, A.D. 484; ante, note 131. These remarks are somewhat obscure. Marshall, op.cit., at 181 gives as a paraphrase of Centlivres , C.J.'s

Repealed, so far as the Parliaments of the Dominions (though not the Canadian provinces[147] or Australian states) are concerned, by s.3 of the Statute of Westminster, 1931, the rule against extraterritorial legislation has given way to a legislative sovereignty subject to no other considerations than those applicable to fully sovereign states:[148]

> 'A legislature which passes a law having extra-territorial operation may find that what it has enacted cannot be directly enforced, but the Act is not invalid on that account, and the Courts of its country must enforce the law with the machinery available to them.'

It is mourned chiefly by taxpayers[149] and bigamists.[150]

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opinion, the following inter alia: 'The court in deciding Ndlwana's Case, he continued, had never really applied its mind to the question whether the Statute of Westminster had impliedly repealed the entrenched clauses. The appellant's case had rested on the assumption that it had, and that bicameral, not joint, sessions were obligatory on the Houses; whilst counsel for the respondents had assumed it too, and had only to confine himself to the preliminary question put by the court as to its ability to inquire into the validity of a promulgated Act. [Hence it had decided per incuriam a vital question on which it had had no argument].'

Ndlwana's argument did not indeed depend on implied repeal by the Statute of Westminster of the entrenched clauses. If he had lost--as he did--on that point, he still had his argument that Act 12 of 1936 was outside the subject matter of the entrenched clauses even taking those clauses to be still in force. But, had he won on the first point it was by no means necessary to consider the second; though Centlivres, C.J., seemed to think that it was: 1952 (2) S.A. at 470. It is difficult to understand Centlivres, C.J.'s analysis, in his own words or in Marshall's exposition, unless by a repeal of the entrenched sections is sometimes meant a repeal of the sections themselves and sometimes a repeal of their obligatory character.

140. 22 Geo. 5, ch.4 (U.K.).

141. [1891] A.C. 455.

142. [1893] A.C. 339.

143. [1906] A.C. 542.

144. [1933] A.C. 156.

145. British Coal Corporation v. The King [1935] A.C. 500 at 520. The Board in Wallace v. Commissioner of Income Tax, Bombay, (1948) 75 I.A.86, denied the existence of a rule that territorial limits 'define' the possible scope of...legislative enactments'. The scope depended on 'the proper construction of'the enabling statute.'

So far as concerns the force, or independence, of Dominion laws, the statute sought both to allow the Dominions (including the Canadian provinces though excluding the Australian states)[151] to legislate repugnantly to Imperial statutes,[152] and to ensure that Imperial laws would no longer operate against them without their request and consent.[153]

Much learning and ingenuity has been expended upon the Act;[154] though, as regards Canada, much intellectual energy may be saved by bearing in mind that section 7 of the Statute, declaring inter alia that:

> '(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder',

reserves an absolute power of disposition of the executive, legislative, and judicial authority of the Canadian state, federal and provincial; and that the power to dispose absolutely entails--or even perhaps is[155]--the power to exercise. What is given with one hand is taken back with the other, at least in strict law.

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146. D.P. O'Connell, "The Doctrine of Colonial Extra-Territorial Legislative Incompetence" (1959), 75 L.Q.R. 318. His inclination towards allowing 'evolution to autonomy in policy-making' or 'maturity' (pp.326,331) to operate a liberation at some uncertain time is unacceptable. See authorities collected in Roberts-Wray, op.cit., p. 390-392. The courts must, it is submitted, choose between holding that (whatever the scope of the rule) it did not exist at common law, or did and still does save insofar as repealed: Norfolk Peerage Claim, [1907] A.C. 10.

147. Examination of the B.N.A. Acts will show the frequent imputation of a territorial limit to the operation of provincial laws; to be found, for example, in almost every head of section 92. See Royal Bank of Canada v. The King [1913] A.C. 283; Reference re Ownership of Off-Shore Mineral Rights (1968) 65 D.L.R. (2d) 353 (Supreme Court of Canada).

148. British Columbia Electric Railway v. The King [1946] A.C. 527 at 542.

149. Ibid., multos inter alios.

Ingenuity misplaced is perhaps more to be pitied than ingenuity unnecessarily expended. The Statute of Westminster, surely, is a more or less successful attempt at creating independent legal orders; if so, its object was to allow Dominion Parliaments to legislate without regard to Imperial authority, and to deny future Imperial statutes force as part of the law of [the original terms, part of the law in force in, being altered by the draftsmen] the Dominion. It was, surely, no part of the object of the Imperial Parliament to give to the South African Parliament a greater degree of protection from Imperial action that is enjoyed by France or Ethiopia. To construe[156] section 4 of the Statute[157] as making Dominion Parliaments and Governments part of the United Kingdom legislative process--lest Westminster, like the pharaoh, harden its heart and repent of freedom granted--seems excessively forced and unnecessary. And if it be said that the power to revoke the Statute of Westminster, if part of the law of the United Kingdom, is part of the law of the Dominion also, then the proper course on the part of the Dominion Parliament is that taken in South Africa: abolish the power in question,[158] by a local statute.

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150. MacLeod v. A.-G. N.S.W. [1891] A.C. 455; In re The Criminal Code, 1892, Sections 275-276 Relating to Bigamy (1897) 27 S.C.R. 461. See now the Extra-Territorial Act, R.S.C. 1952, c.107.

151. Sections 1 and 7(2).

152. Section 2; see generally, K.C. Wheare, The Constitutional Structure of the Commonwealth (Oxford, 1960).

153. Section 4.

154. Ante, note 148; and in general textbooks on British constitutional law; recently, J.D.B. Mitchell, Constitutional Law (Edinburgh, 1964) pp.63 ff.

155. McCawley v. The King again; ante p. 341 ff. Kariapper v. Wijesinha, [1967] 3 all E.R. 485.

There is thus no reason to doubt that, in United Kingdom law, Parliament remains competent to deal with the Statute of Westminster at pleasure. There has been no 'autolimitation' and none is needed. There is, in United Kingdom law, no obstacle to enacting laws to bind foreign countries; and no such obstacle is needed to protect Commonwealth countries. If United States sovereignty does not, in United Kingdom law, involve any auto-limitations of United Kingdom parliamentary sovereignty, neither should New Zealand sovereignty do so; still less are either the United States Congress or the New Zealand General Assembly parts of the United Kingdom Parliament for any purpose whatsoever.

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156. J.D.B. Mitchell, Constitutional Law (Edinburgh, 1964) p.63 n., who at least countenances the theory of the 'extra-parliamentary stage'.

157. '4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.'

158. The Status of the Union Act, 1934 (No.69 of 1934), in exercise of the power of the South African Parliament to legislate even repugnantly to Imperial statutes, enacted: '2. The Parliament of the Union shall be the sovereign legislative power in and over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom...passed after the eleventh Day of December, 1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union.'

CHAPTER VII

CONSTITUTENT AUTHORITY AND THE CANADIAN PROVINCES

Having expended much time in arguing the matter,[1] let us now assume that it may, for our present purpose, be taken for granted that in Canada law may be made according to law,[2] and not otherwise;[3] a proposition for which, if authority be required, it will be found in the greatly preponderant weight of decided cases and learned authors, to the bulk of which references may be found in the works already cited. The proposition will, of course, find, for obvious reasons, more ready acceptance with regard to a federal system, even though there is no logical connection between the two as such,[4]

The author is here concerned to probe the impact of changes in the lawmaking processes of the Canadian provinces upon the constitutional structure of Canada as a whole. It is perhaps worth bearing in mind that though the most obvious changes in lawmaking processes are thought of as a special class called "constitutional amendments", this is more or less a matter of degree, for all changes in the law will have an impact, more or less obvious or obscure, proximate or remote, on the lawmaking process; the impact of an Elections Act being more obvious, that of a Bills of Exchange Act (on the solvency

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1. Ante. p.300 ff.

2. W. Ivor Jennings, The Law and the Constitution, 3rd ed., (London, 1943), See ante, p.315

3. Compare H. W. R. Wade, 'The Basis of Legal Sovereignty,' [1955] Camb. L. J. 172, with Jennings, op cit., 5th ed. (London, 1959) p. 137 ff. and especially p. 318 ff., and Marshall, Parliamentary Sovereignty and the Commonwealth (Oxford, 1957), especially at pp. 43-46.

4. See Lord Birkenhead in McCawley's Case, ante p. 341 ff.

of members of Parliament and therefore on their qualifications) less so. It is in this respect that the Kelsenian hierarchy of laws or norms seems seriously oversimplified, failing as it does to take account of the essential circularity, or wholeness, or "seamlessness" of the law.

Since the British North America (No. 2) Act, 1949,[5] the Parliament of Canada has apparently[6] enjoyed the power to recast the structure of the Dominion lawmaking power into forms other than those prescribed by sections 17 and following of the B.N.A. Act, 1867, since these sections do not seem to fall within the exceptions made to the power conferred by s. 91 (1) of the B.N.A. Act, introduced in 1949. Nor does the attribution of Dominion lawmaking power to the "Queen, by and with the Advice and Consent of the Senate and House of Commons" seem to fall within the exceptions made to s. 91 (1). If such be the case, it would seem open to the Parliament of Canada to complicate the lawmaking processes with all manner of referenda, special majorities, or other 'entrenchments', whether with a view to safeguarding civil liberties, or for other reasons. Compliance with these complications could be made essential to valid lawmaking. Probably section 6 of the Fulton-Favreau Formula of 1964 would have closed the door to much of this type of action at the federal level except such as could be accomplished by changing the constitution of the houses individually.

But it is in the provinces, however, rather than at the federal level, that experiments of this sort are more likely, as history has shown, and as the Premier of Quebec has lately suggested history may again show. Such experiments are of course in themselves interesting legally and politically, but their full importance can only be appreciated once it is realized that, to the extent that the provincial legislatures may

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5. 13 Geo. VI, c. 81 (U.K.).

6. The argument contra would be that the new legislative process must remain a "Parliament" (whatever essential characteristics that may be held to involve) if it is to wield the powers inter alia conferred by s. 91. But even so, the relations between the two houses, and their respective constitutions, could be enormously altered - and even special majorities or a third house introduced.

reconstruct themselves, they may very possibly also be able to complicate any ultimate general constitutional amendment procedure for Canada which speaks, as the Fulton-Favreau Formula uniformly does, of action by the legislatures of the provinces.

It is with the object of giving at least such indication as the authorities permit, of the extent of the provincial constitutional amendment power, that I engage in the following minute examination of the few decided cases, in an effort to distill their precise authority. What they decided is not so obvious as may at first reading be thought.

II. RECASTING THE LAWMAKING PROCESS BY PROVINCIAL ENACTMENT.

1) The Obstacles to Provincial Constitutional Change

Western Canadian experiments with the "initiative" and "referendum" have given rise to the litigation which has produced at once the best illustration of the problems of, and the most authoritative judicial pronouncements upon the limits of, the change, by provincial enactment, of the lawmaking procedures of the Canadian provinces.

The B.N.A. Act injects two specific arguable obstacles to the recasting by the provincial legislatures of the law prescribing the processes of lawmaking.[7] Two, but with this reservation: that these "two" obstacles appear to overlap at one point at least; but, subject to this, they may be divided into the two following:

First, is the qualification that the provincial legislature shall have power with respect to, s. 92 (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." [Emphasis added]. This seems clearly to preclude any provincial enactment interfering with the

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7. As to s. 92 (1) generally, reference may be made to Rex ex rel. Tolfree v. Clark [1943] O.R. 319; [1943] 2 D.L.R. 554 (Hope J.); [1943] O.R. 501; [1943] 3 D.L.R. 684 (C.A.: Riddell, Fischer, Henderson, Gillanders and Laidlaw JJ. A.). Leave to appeal refused: [1944] S.C.R. 69; [1944] 1 D.L.R. 495. See also R. ex rel Brooks v. Ulmer [1923] 1 W.W.R. 1; 19 Alta. L.R. 12; 38 C.C.C. 207; [1923] 1 D.L.R. 304; A.-G. for Sask. v. C.P.R. [1953] A.C. 594; North Cypress v. C.P.R. (1904) 35 S.C.R. 550; (1903) 14 Man. R. 382.

participation of the Crown --- or such participation at least as is prescribed expressly or impliedly in the B.N.A Acts --- in thelegislative process: in particular, the royal assent to, and reservation of, bills, and (perhaps for partly different reasons) the disallowance of Acts.

Second, are the words of the B.N.A. Act granting to the provincial legislatures their powers: "In each province the Legislature may exclusively make laws in relation to" & c. [Emphasis added]. It is possible, by a restrictive[8] construction of these words, to incorporate by reference into the term "Legislature" any such array of qualifications as would require, in greater or lesser measure, conformity with some perhaps elaborate judicially-expounded meaning of "legislature"; more especially, conformity with some postulated standards, of one sort or another, of parliamentary government. In particular, it is possible to confine the exercise of provincial legislative power to the Crown acting in conjunction with representative bodies of one sort or other.

2) Scope of the Manitoba "Initiative and Referendum Act"

Both obstacles were considered in the leading decision on the subject, In re The Initiative and Referendum Act[9] arising from "An Act to enable Electors to Initiate Laws, and relating to the Submission to the Electors of Acts of the Legislative Assembly", being 6 Geo. V. c. 59 of the Statutes of Manitoba, which received royal assent on March 10th, 1916, with the short title "The Initiative and Referendum Act".

The Act provided for direct participation of the electors in the legislative process, electors being defined by s. 2 to

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8. Restrictive because on such an interpretation not everything would, simply by being designated as the lawmaking power, be a "Legislature" within the B.N.A. Act.

9. The decision in the Court of Appeal for Manitoba is reported at (1916) 27 Man. R. 1; in the Privy Council, [1919] A.C. 935. Reference of the Act was made under R.S.M. 1913 c. 38 to the Court of King's Bench (Mathers C.J.K.B.) where "by consent there was no argument": [1919] A.C. 935 at p. 938; the learned Chief Justice giving a formal judgment in favour of the validity of the Act, from which appeal was taken.

mean persons whose names appeared on the electoral lists which would be used at the relevant time for elections to the Assembly. The long title of the Act, quoted above, gives some indication of the two forms which the electors' direct participation was to take: (1) to "initiate" laws --- in short, to propose them and bring them to the statute book unless the representative Legislature did so first --- and (2) "Submission to the Electors of Acts of the Legislative Assembly" --- roughly, the exercise of a negative voice against enactments of the Lieutenant-Governor and Assembly, during a period of their suspended operation or afterwards; to which may be added a submission of laws enacted by the new procedure (1).

3) <u>The Referendum as an Element of Legislation: (i) Sufficient for legislation: (ii) Necessary to legislation.</u>

Though the minds of the judges did not ever seem clearly directed to it, the difference is obvious between a referendum (i) exercising a positive power of legislation in itself [or, if need be, in conjunction with the Crown, a situation which may conveniently be assimilated thereto]; and, on the other hand, a referendum (ii) exercising a negative voice on legislation.

In the <u>former</u> case, instantiated by the Manitoba "Initiative", the electors become a <u>sufficient</u> condition for legislation [if need be, acting in conjunction with the Crown: a point in which the Manitoba legislature was held to have sinned], for the electors are able to pass the legislation themselves [if need be with, --- and there is need of, --- royal assent].

In the <u>latter</u> case, on the contrary, --- instantiated by the Manitoba "Submission" --- the electors are not a <u>sufficient</u> but a <u>necessary</u>, condition to legislation. To state the obvious, they obtain a negative voice only, as in Britain do Queen, Lords and Commons each; in Canada, Queen, Senate, and Commons; in

most provinces, Queen and Assembly.

What is important is that these two kinds of direct popular participation are not only analytically and legally distinct: in addition to this, different considerations of policy apply. Thus, of two common objections to direct democracy which spring to mind immediately, one[10] is to the effect that "bills" passed by voters have no opportunity of being debated, considered and amended during their passage: it is clear that this has force rather against enactment of measures by the voters alone, than against referral to the voters only after the bill has been fully debated, considered, amended if necessary, and approved, by the representative bodies; with the result in the latter case that the voters may only then pass on it (whether because it must meet a requirement of prior affirmative consent or because it stands subject to their expression of disapproval.)

The other policy objection, too, --- danger of ill-advised measures being brought in either on sudden passions or through popular ignorance of the issues or difficulties involved --- makes sense equally rather as an objection to the electors being a sufficient legislature, than to their consent being necessary. So much is this true that the referendum is found in constitutions frequently as a condition for the change of certain classes of laws; and this is quite obviously done as a technique of conservatism --- of "entrenchment" --- to protect constitutional provisions of one sort or other from being too readily changed, especially freedoms thought fundamental. For, when a referendum is added, change is made more difficult , not easier; the popular voice being required in addition to, not in lieu of, other requirements.

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10. Per Richards J.A., (1916) 27 Man. R. 1 at p. 15; per Perdue J. A. at p. 23. Both thought that this weighed as showing that the Initiative could not have been within the contemplation of the B.N.A. Act.

4) Requisites for Legislation: Distinguishing Necessary from Sufficient Conditions.

Thus, in understanding the problems in the regulation by law of the lawmaking processes, the first step is to make the obvious distinction between a condition established as sufficient for legislation and one established as necessary to legislation. In the language of the logician, the legislative process may be described in terms of the conjunctions and disjunctions of necessary and sufficient conditions for legislation. Thus, the necessary and sufficient condition for an act of the Parliament of Canada is (neglecting their order, and without a further breakdown to see what is required for valid action by each) the conjunction of the concurrences of Crown, Senate and House of Commons; each being necessary; no one or two being sufficient. In Manitoba, the concurrence of Crown and Assembly would theretofore have been necessary and sufficient for legislation. But under the Initiative and Referendum Act, another sufficient mode of legislation --- that by referendum --- was created, called the "Initiative". As the terms of the said Act were interpreted by the Courts, that Act purported to dispense with the Crown as part of the "Initiative" procedure; and this defect was held fatal to the initiative.[11] In other words, the Act was held to have tried to introduce a new and alternative mode of legislation, --- not Crown-and-electors, but electors. Had the Act made it clear that "proposed laws" once passed by the voters had still to be presented for royal assent, the Courts would have had to face squarely the referendum problems, instead, as we shall see, of turning the matter on interference with the office of

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11. As the"referendum" (on submission to the electors of Acts passed by the Assembly) was treated as simply repealing lawmaking, it, too, was held bad for dispensing with the Crown: [1919] A.C. at p. 944.

Lieutenant-Governor. Specific safeguarding of the royal prerogative would have eliminated this ultimately crucial ground of ultra vires. But it is clear that, however interpreted, the Act meant to set up a new and alternative referendal legislative process intended to operate side by side with the representative one.[12] That much admitted of no doubt, the only obscurity was whether it had been intended to include the Crown.

5) Concurrent Processes of Legislation

Prima facie, at any rate, the Initiative and Referendum Act appeared to leave the representative legislative process fully intact and competent to make laws on every subject as fully as before: though now, of course, it would not be the sole legislative power.

This, of course, is, potentially, a highly interesting situation: for, two equally competent legislative processes, each independent of the other, may act disharmoniously, each undoing the work of the other (the last to speak laying down, in principle, the governing law)--or even engage in a race to the statute book to alter the constitution of the other, restrict its power, or even abolish it outright.

Likelihood of disharmony is of course reduced in the measure that like Siamese twins, the two processes share one or more common organs: as, the Crown--but nevertheless, of two concurrent legislative powers, there is no prima facie reason to suppose either to be immune from interference by the other. Thus, in prinicple, legislation passed by the "representative" process might abolish or restrict or reform the "referendal" process (as, if the Legislature of Manitoba, having once enacted the Initiative and Referendum Act, repented and proceeded to repeal it); or, equally, the "referendal" process might enact a law to

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12. The Legislature, in Lord Haldane's words, [1919] A.C. at p. 945, had tried to 'create and endow with its own capacity a new legislative power'. [Emphasis added]. Judgment was reserved on whether this was possible.

reform, restrict, or even abolish, the "representative" legislature.[13]

6) Entrenchment as a Solution to Instability of Alternative Processes

The obvious instability of stituations of this type --- especially where the alternative processes are wholly independent one of the other [as was the case here once the courts interpreted the Manitoba statute as leaving the Crown as a participant only in conjunction with the Assembly, not with the electors] --- is easily overcome by a rule excluding from the competence of one of the legislative processes whatever subject-matter it is desired to leave free and clear to the other. And one of the processes can without much difficulty be given a reasonable protection by excluding from the competence of the other, the alteration of the constitution of the first-mentioned process, as well as the alteration of this rule itself.

7) The Right to Entrench

Dicey's rule against parliament "binding" itself, or "binding" its successors, can be given a meaning, consistent with the unquestionable power of Parliament to recast the lawmaking process, if understood as a rule against the creation of vacuums. In such form, it could be formulated as providing that "Parliament cannot

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13. It is precisely the full equality of the new legislative power with the old one that made the Courts refuse to consider the situation as merely one of delegation. And exactly the same reasoning applies to show that legislation under the Parliament Acts, 1911 and 1949, is not delegated authority but fully primary authority: with deference to Professor H. W. R. Wade, [1955] Camb. L.J. 172 at p. 193; Administrative Law (1961) p. 9 and to Dr. Yardley, Source Book of English Administrative Law (1963) p. 3. Considered as subdelegation, the passage, under the 1911 Act, of the Parliament Act, 1949 would be considered as going far beyond permissible bounds, for it flouts the terms of the "delegation". Considered as the alteration by a delegate in the terms of the delegation, its illegality would be indisputable. If the Parliament Act, 1949, is valid, then the Parliament Act, 1911 was not a delegation but a change in the lawmaking process.

validly legislate to provide that there exist during some finite time some rule of law, actual or formulable, for which there exists no legislative process by which it can be enacted as law". This may reasonably be urged to be the common law; but any rule against "binding" which goes beyond this, and which yet allows for permissible reconstitution and redefinition of the lawmaking processes, cannot, it is submitted, be meaningfully formulated. At most it can be said that Parliament cannot create a legislative vacuum. Even the introduction of a referendum into the U. K. lawmaking process would require no more than taking the road pointed out by Walter Bagehot in The English Constitution (1872): namely, creating every man and woman in the U. K. a peer; though elections to the House of Commons might become difficult unless peers were given the vote as well. In principle the same power to recast the provincial lawmaking process must rest with the provincial legislatures of Canada, saving interference with the office of Lieutenant-Governor, subject to a restrictive construction of the word "Legislature" in s. 92 of the B.N.A. Act. There have been suggestions of a restrictive construction of the word "amendment" in s. 92; thus, per Perdue J.A:[14]

> 'The amendment contemplated by No.1 of section 92 was not the substitution of a new constitution or of one founded on new principles. It was intended, I think, merely to give the provinces power to alter certain details of structure or machinery deemed necessary for the efficient operation of the constitution, the essential design and purpose being preserved.'

And powers of federal remedial legislation under the peace, order and good government power could be developed. But it is not easy to see why any of these would make it illicit to use any of the usual techniques of entrenchment; and even a referendum as a necessary condition of legislation would,[even apart from the Colonial Laws Validity Act, 1865, a largely declaratory statute] seem permissible under A.-G. N.S.W. v. Trethowan.[15]

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14. (1916) 27 Man. R. 1 at p. 23.

15. [1932] A.C. 526; on appeal from (1931) 44 C.L.R. 394; ante p. 311 ff.

Entrenchments at the provincial level are envisaged by the B.N.A. Act, 1867, in that s.80 creates one. That section requires in substance the consent of a majority of the members of the Assembly coming from constituencies listed in the Second Schedule as a prerequisite to passage by the Legislature of a bill to alter the constituency boundaries. Unless their concurrence is obtained on second and third readings "it shall not be lawful to present to the Lieutenant Governor of Quebec for Assent" the bill. Does that make assent void when the bill has wrongfully been presented, or merely create a punishable or restrainable wrong in the presenting? "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". Here the condition is merely an address reciting passage. If there is no address, is assent null? Even if concurrence had in fact been obtained? Can section 80 be repealed in the ordinary manner? The Statute of Westminster, 1931, is of little assistance though it removes nullity for repugnancy to Imperial Statutes, it excepts the British North America Acts; so the provincial legislature could not do so after 1931 if it could not do so before. Could it do so before then?

And whatever view be taken of Re Initiative and Referendum Act, it should be remembered that in that case, the decision, whatever it may be taken to have said about referenda, or about creating new legislative powers in which the Crown had no share, left a very great deal of room for creating or replacing Houses, and providing for special majorities, or for making use of other techniques of entrenchment. Viscount Haldane indicated that he would have sustained so much of s.12 of the statute under consideration as postponed the operation of statutes for certain periods: when we read s.12 we see a special two-thirds majority requirement to bring a statute into earlier operation.

The provincial Legislatures would seem left with a great freedom to prescribe by law the lawmaking processes; and the laws

by which they do so are of full force and effect, and must be respected.

III. THE INITIATIVE AND REFERENDUM CASE AND THE PROVINCIAL CONSTITUTIONS.

1) The Statute and the Issues arising from It

It will now be convenient to examine closely the legislation in question, and the decisions thereon, to find their precise authority and meaning, not only for evaluation and criticsm, but in order to set out as far as possible the exact state of the law on a matter whose great implications on constitutional amendment in Canada have been suggested earlier.

The crucial portions of the Initiative and Referendum Act[16] are the Initiative provision of section 7, giving the electors a power of making laws:

> "7. A proposed law so referred to the electors and approved of by a majority of the votes polled thereon shall, unless a later date is specified therein, take effect and become law, subject, however, to the same powers of veto and disallowance as are provided in the British North America Act or as exist in law with respect to any Act of the Legislative Assembly, as though such law were an Act of the said Assembly, on a date to be fixed by proclamation to be made by the Lieutenant-Governor-in-Council, which date shall not be later than thirty days after the clerk of the Executive Council shall have published in The Manitoba Gazette a statement of the result of the vote on said law in accordance with section 35 hereof."

and the "submission" or (in Cameron J. A.'s terminology[17]) "referendum" provision of section 11 in conjunction with s. 9 (1), respecting laws submitted to the electors for their censure:

> "9. (1) Upon petition in writing of any electors, not less in number than five per cent of the total votes polled at the general Provincial election last held previous to the date

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16. 6 Geo. V, c. 59 (Stat. Man., 1916).

17. Per Cameron J.A. (1916) 27 Man. R. 1 at p. 32, 'The Act purports to do two different things, which are indicated in its title as above...' At p. 34 he speaks of 'what may be called "the Referendum" as distinguished from "the Initiative"'. See also p. 43.

of the petition herein referred to, whose names appear on the lists of electors, last made and revised under "The Manitoba Election Act" previous to the date of the petition herein referred to addressed to the Lieutenant-Governor-in-Council, and filed in the office of the clerk of the Executive Council, requesting that any Act of the Legislative Assembly or part or parts thereof, whether now or hereafter in force, or not yet in effect by reasons of section 12 hereof, or any law enacted under the provisions of sections 3 to 7 of this Act, be referred to the electors, the Lieutenant-Governor-in-Council shall, in the manner hereinafter provided, subject, however, to the provisions of subsections (2), (3) and (4) hereof, submit such Act or law, or part or parts thereof, to a vote of the electors of the Province to be taken at the next general provincial election, unless a special referendum vote is asked for in the petition;..."

"11. In the event of such Act or law or parts thereof not being approved of by a majority of the votes polled at such referendum, such Act or law, or part or parts thereof so disapproved, shall, at the end of thirty days after the clerk of the Executive Council shall have published in The Manitoba Gazette a statement of the result of the vote on such Act or law, or part or parts thereof, become and be deemed repealed."

The Act contains thirty-nine sections and occupies twelve pages of the statute book; and as a summary is useful, it is as well to give that offered in the judgment of Lord Haldane for the Privy Council:[18]

> "The validity of the Initiative and Referendum Act, a statute of a type which is not unknown in parts of the world with constitutions different from that of Canada, of course depends on whether the Constitution of Canada as defined by the British North America Act of 1867 permitted a Provincial Legislature to pass it into law for the Province. The first step in the consideration of the matter is therefore to ascertain the exact character of the legislation proposed. In substance it is this. The Legislative Assembly seeks to provide that laws for the Province may be made and repealed [emphasis added] by the direct vote of the electors, instead of only by the Legislative Assembly whose members they elect. The machinery created for the accomplishment of this end is that first of all a number of the electors, being not less than eight per cent. of the number of votes polled at the last election, may by petition submit a proposed law to the Legislative Assembly. In the next place, the proposed law, unless enacted without substantial change by the Assembly in the session in which it is submitted, must be submitted by the Lieutenant-Governor in Council to a vote of the electors, to be taken at the next general Provincial election, unless a special referendum vote has been asked for in the petition. Provision is made for time being available in which to obtain the opinion of the Attorney-General, and if necessary of the Court, as to whether the proposed law is intra vires. If not it cannot be submitted. If a special referendum vote has been asked for it is usually to be taken within six months from the presentation of the petition. In the third place, if a proposed law has been submitted to the electors, and approved by a majority of the votes polled, it is to take effect, "subject, however, to the same powers of veto and disallowance as are provided in the British North America Act or as exist in law with respect to any Act of the Legislative Assembly, as though such law were an Act

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18. [1919] A.C. 935 at p.939.

of the said Assembly", on a date to be proclaimed by the Lieutenant-Governor, and to be not later than thirty days after the official announcement of the result of the vote.'

'The proposed law further provides that a number of electors, equivalent in this case to not less than five per cent. of the number of votes polled at the last election, may petition for the repeal [emphasis added] of any Act of the Assembly or of any law enacted by the new method, the validity of which is now in question, and provisions, not differing in material respects from those already referred to, are made for the repeal of such act or law. There are in the Initiative and Referendum Act other provisions which may be mentioned briefly. No Act of the Legislative Assembly is to take effect until three months after the end of the session in which it was passed, unless in a preamble voted for by two-thirds of the members voting, the Act has been declared to be an emergency measure, but this is not to apply to a Supply Bill or Appropriation Act, except as to items for capital expenditure exceeding $100,000. When a vote is to be taken under the Act the Lieutenant-Governor is to order the issue of writs in his Majesty's name for taking such vote, and he is also to provide for the public dissemination of information and arguments on the matters referred, not exceeding twelve hundred words for each side.'

Did this enactment, whose substance has just been summarized, infringe the B.N.A. Act in interfering unlawfully with the office of Lieutenant-Governor? Alternatively, was there infringement consisting in an attempt to vest the authority in question in a body or process other than a"Legislature" within the meaning of the B.N.A. Act?

2) Interference with Office of Lieutenant-Governor

The judgment of the Privy Council construed widely the exception contained in s. 92 (1) of the B.N.A. Act, to the provincial legislative power of constitutional amendment. In the words of Viscount Haldane:[19]

'The analogy of the British Constitution is that on which the entire scheme is founded, and that analogy points to the impropriety, in the absence of clear and unmistakable language, of construing s. 92 as permitting the abrogation of any power which the Crown possesses through a person who directly represents it.'

Of course, even on a narrower construction of the exception, the power of royal assent to bills must obviously still have fallen squarely within it, clearly being as it is the essence of the position of the Crown, represented by the Lieutenant-Governor, as part of the Legislature of the province. In any event, his Lordship continued:[20]

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19. [1919] A.C. 935, 943.

20. Ibid., at p. 943

> 'When the Lieutenant-Governor gives to or witholds his assent from a Bill passed by the Legislature of the province, it is in contemplation of law the Sovereign that so gives or witholds assent. Moreover, in accordance with the analogy of the British Constitution which the Act of 1867 adopts, the Lieutenant-Governor who represents the Sovereign is a part of the Legislature. This is in terms so enacted in such sections as s. 69, the principle of which has been applied to Manitoba by s. 2 of the Dominion Statute of 1870, which formed the new Province... It follows that if the Initiative and Referendum Act has purported to alter the position of the Lieutenant-Governor in these respects, the Act was in so far ultra vires.'

Upon the question of the construction of the Initiative and Referendum Act, the Privy Council held that, properly interpreted, the Act had intended to dispense with the concurrence of the Lieutenant-Governor, as well for legislation by Initiative (s.7):[21]

> 'if the Act is valid it compels him to submit a proposed law to a body of voters wholly distinct from the Legislature of which he is the constitutional head, and renders him powerless to prevent it from becoming an actual law if approved by a majority of these voters. It was argued that the words already referred to, which appear in s. 7, preserve his powers of veto and disallowance. Their Lordships are unable to assent to this contention. The only powers preserved are those which relate to Acts of the Legislative Assembly, as distinguished from Bills, and the powers of veto and disallowance referred to can only be those of the Governor-General under s. 90 of the Act of 1867, and not the powers of the Lieutenant-Governor, which are at an end when the Bill has become an Act.'

as for the effect of a referendum, taken on "submission" to approve or disapprove Acts made by the old or new methods, under s.11:

> 'Sect. 11 of the Initiative and Referendum Act is not less difficult to reconcile with the rights of the Lieutenant-Governor. It provides that when a proposal for repeal [emphasis added] of some law has been approved by the majority of the electors voting, that law is automatically to be deemed repealed at the end of thirty days after the clerk of the Executive Council shall have published in the Manitoba Gazette a statement of the result of the vote.'

Their Lordships, in sum, held that:[22]

> 'Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority.'

And in so construing s. 7 and s. 11 as dispensing with the Lieutenant-Governor's concurrence, their Lordships affirmed the Court below.[23]

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21. [1919] A.C. 935 at p. 944.

22. [1919] A.C. 935 at p. 944.

23. Howell C.J.M. (1916) 27 Man. R. at p. 8 Per Richards J.A.

3) The Voters' "Negative" ("Submission","Referendum") as an Interference with the Lieutenant-Governor

This finding --- that the Act intended to create a legislative power in which the Crown should have no part --- can scarcely occasion much surprise. What must, however, create some difficulty is the excessive facility with which the negative voice given to the electorate (to disapprove laws which they might require by petition to have submitted to them), was assimilated to the positive voice (initiative) given to them to enact legislation. Emphasis has been added to certain portions of the passages quoted above in the text and notes, wherein it becomes clear that the electorate's 'negative' voice (submission) was being assimilated to the 'positive' (initiative) by treating the negative simply as if it were a repealing enactment: that is, as simply a particular kind of legislation; or, to put it another way, simply a particular instance of a more general rule (section 11) providing for referendal legislation in disregard of the rights of the Crown.

If the electorate's negative voice is here being assumed to be as much a legislative enactment as its positive voice, the Manitoba legislature can scarcely complain that the courts reached such a conclusion uninvited: for the very terms of the Initiative and Referendum Act:

> '11. In the event of such Act or law or part or parts thereof not being approved by a majority of the votes polled... such Act or law, or part or parts thereof so disapproved, shall... become and be deemed repealed.'

called the electorate's disapproval a 'repeal'. Still, if we are to concern ourselves with the substance of the enactment --- i.e., with what was enacted --- and not only with the form of words used

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at p. 16: Per Perdue J. A. at p. 27 and p. 29. (His Lordship indicates at p. 29 that he thinks of the voters'negative'--- the submission to referendum --- as a repealing statute: 'If there are any doubts that this is the effect under section 7 the intention of the Act to dispense with the assent of the Lieutenant-Governor is most clearly shown by section 11. That deals with the repeal of an existing law.' [Emphasis added].) Cameron J.A. speaks of interference with the Lieutenant-Governor's functions as to money bills (p.42) and as to legislation (p.43), concluding 'These essentials are ignored, and I am satisfied that they were intended to be ignored.' At p. 44 he discusses the meaning of the term 'veto', and at p. 45 funds a constitutionally invalid material addition to the office of Lieutenant-Governor. Haggart J.A. merely expressed concurrence.

(which could easily be changed), it is by no means clear that there was here a power given to the electorate to enact a repealing law. One can, almost as readily, read the Initiative and Referendum Act as merely subjecting the legislation of the province to one more condition in addition to Crown and Assembly: a condition of voters' approval; and, more particularly, a condition subsequent (if not a condition precedent) of voters' approval.[24]

Disallowance, too, operates much as would a repealing enactment;[25] yet no one thinks of disallowance as a new, repealing

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24. At this point, argument can become rather fine. As by the terms of s. 9 (1) of the Act the voters can compel submission to them not only of (a) laws thereafter enacted by Crown and Assembly, but whose operation has been suspended by s. 12; and (b) laws thereafter enacted by Crown and Assembly, and in immediate operation; and (c) laws enacted by the Initiative under s. 3 to 7 of the Act; but even of (d) laws enacted by Crown and Assembly even before the coming into force of the Initiative and Referendum Act, it is consequently likely to be responded that it is unreasonable to speak of the Legislature as having enacted laws of category (d) subject to any condition of any kind. It will be argued in consequence that in this case, at least, the voters' negative must be treated as a repealing statute. To this the reply may be made that this argument is good only as to class (d). Moreover, there is a two-fold reply to the argument. One can choose to say that the Initiative and Referendum Act was itself the conditional repealing legislation; did itself subject all earlier statutes to this condition. Or one can say that the voters' negative is of the nature of disallowance: and disallowance is not considered a repealing enactment though it has much the same force as one.

Notice incidentally, that s. 9 (1) gives the voters a censure or negative power over a seemingly exhaustive enumeration of types of laws; but does not mention s. 9(1) and s. 11 themselves. If action under s. 9 (1) and s. 11 is to be considered a repealing law, why not include it, like other forms of laws, as being capable of being negatived under those sections? Merely because new legislation could be passed by other procedures instead of repealing a repealing law?

25. That is to say, secundum quid; not simpliciter; the disallowed enactment is ineffective for the future but good as to the past. Wilson v. Esquimalt and Nanaimo Railway [1922] 1 A.C. 202; Duff J. for the Privy Council at p. 209: '...The point under examination turns...upon the effect to be ascribed to the words "shall annul the Act from and after the day of such signification." ...Their Lordships think that the language itself discloses with sufficient clearness an intention that, at all events as to private rights completely constituted, and founded upon transactions entirely past and closed, the disallowance of a Provincial statute shall be inoperative.'

statute.[26]

There is, in short, very strong reason for regarding a voters' negative as being not necessarily or in every case a power of enacting repealing legislation by a procedure which dispenses with royal assent and which therefore infringes the B.N.A. Acts. One may see it instead as (1) the exercise of a statutory power to whose operation the provincial legislature has subjected its statutes; or (2) as a condition subsequent subject to which a statute has been enacted. And whatever the true nature of the Manitoba legislation, properly framed legislation could easily cast a voters' negative as a condition subsequent.

What is of the greatest importance in applying this case is to bear in mind that the Privy Council did not have occasion to consider the imposition of a referendum as a condition PRECEDENT to some or all classes of legislation. It did not therefore give a ruling about referenda simply. What its attitude might have been to the imposition of a referendum as a condition precedent to some or all classes of legislation, must be a matter for conjecture but in face of A.-G. N.S.W. v. Trethowan[27] it is not easy to see what objection could be raised. Certainly it would be most difficult to find any infringement of the Crown's authority; the Crown would participate as usual. Yet, unless a condition-precedent referendum would offend in this regard, it is hard to see why a condition-

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26. A power of disallowance probably exists to the extent that the constitutional provisions creating it are in force at the time that this power is exercised. If it is the time of exercise that is material, disallowance would be exercisable against a statute passed before a disallowance power existed. Conversely, were it removed from the B.N.A. Act, it could not be exercised at all, even as to statutes enacted before its disappearance. Applying this analogy of a royal negative to a voters' negative, we may conclude that it is no more true to say of the one than of the other that it must be looked upon as a repealing law merely because the disapproval power came into existence only after some or all of the laws against which it might be exercised. If this be so, my analogy between disallowance and voters' negative --- neither being necessarily the enactment of a law --- remains good even as to laws in force before the Initiative and Referendum Act.

27. [1932] A.C. 526.

subsequent referendum should in any way be distinguishable. Must we then conclude that in Canada (unlike Australia), the Privy Council having seemingly rejected the latter at the provincial level, has also impliedly rejected the former as well? The answer, surely, is that their Lordships were not considering conditions of any kind, whether precedent or subsequent.

In all probability, the Privy Council, seeing the Manitoba referendum appear in the guise of "repealing" legislation, took the statute at its word and did not think to analyse further. It is strongly arguable therefore, that when the question comes to be put, a "negative" referendum or referendum imposing voters' consent as a condition to enactment would be valid at the provincial level, even when cast in the form of a condition subsequent. When cast as a condition precedent, the validity would have strong support from the Trethowan case.[28]

That case does not truly turn upon the Colonial Laws Validity Act, 1865, of which section 5 requires that legislation be enacted in accordance with manner and form required by law, and of which section 1 defines "Legislature" to include lawmaking authorities generally. Dixon J., in the Australian High Court gave reasons covering the Imperial Parliament itself,[29] and, as has been said above, this position is gaining the overwhelming support of judicial authority and learned opinion. Even the objection to applying this view to the Canadian provinces, on the ground that they would then not have "Legislatures" within the meaning of s. 92 (1), has in considerable measure been repudiated in Australia, where raised by McTiernan J. dissenting in Trethowan's Case.[30]

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28. Ibid. In the High Court of Australia (1931) 44 C.L.R. 394

29. (1931) 44 C.L.R. 394 at p. 426-7

30. Ibid. 442, 448-9.

In any case, the matter seems, at very least, open in Canada. Taking In re the Initiative and Referendum Act as settled law, when must we, upon its authority, hold the imposition of a negative upon legislation --- in particular a referendal negative --- to infringe the rights of the Crown? Taking a wide view, one might say that, on the authority of this case, a referendum as condition subsequent is always bad, but that the question is at least open whether a condition precedent is good (because it does not dispense with the Crown and because the Privy Council reserved judgment on other objections). Yet the distinction between conditions precedent and subsequent seems pointless, especially since, in one form at least, conditions subsequent are good beyond question (i.e. the bringing of laws into force on proclamation, to say nothing of other conditions) by universal acceptance. We must, it would seem, look for a narrower ratio decidendi, and one is readily apparent: the "negative" is bad when it is cast as the enactment of repealing legislation.[31] Thus, their Lordships said:[32]

> 'Section 11 of the Initiative and Referendum Act is not less difficult to reconcile with the rights of the Lieutenant-Governor. It provides that when a proposal for repeal of some law has been approved by the majority of the electors voting, that law is automatically to be deemed repealed at the end of thirty days after the clerk of the Executive Council shall have published in the Manitoba Gazette a statement of the result of the vote. Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority.' [Emphasis added.]

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31. Even the characterization by the courts of s. 11 as providing for repealing legislation is open to question, inter alia because s. 11, though it uses the term "repeal" itself, has the following interesting feature. An Act submitted to the voters is by s. 11 considered rejected by "not being approved of by a majority of the votes polled", meaning, apparently, that the Act FAILS on equal division, which can be contrasted with the requirement of s. 7 that positive legislation requires to be "approved of by a majority of the votes". This makes the voters' negative look more like failure of a condition subsequent of voter approval than like a repealing law enacted by voters. One expects a law --- even a repealing law --- to require a majority if it is to pass; while a law fails on equal division in an assembly whose consent is needed by way of a condition of passage.

32. [1919} A.C. at p. 944

Likewise in the Court of Appeal, Howell C.J.M. said:[33]

> 'I do not think that the portion of the proposed Act which is known as the Initiative, including the procedure for repealing statutes, is within the power of the Province to enact.' [Emphasis added.]

and similarly per Perdue J.A.:[34]

> 'If there are any doubts that this is the effect under section 7 the intention of the Act to dispense with the assent of the Lieutenant-Governor is most clearly shown by section 11. That deals with the repeal of an existing law. If such law is not approved by a majority vote, at the end of thirty days after publication of the vote, it shall "become and be deemed repealed". Nothing could be clearer than the intention of this section to do away with the assent of the Lieutenant-Governor.'

It is indeed telling that so far did the Privy Council think in terms of s.11 as a repealing procedure that their Lordships apparently misread the section itself, and, in the passage just quoted, said that a law is repealed "when a proposal for repeal of some law has been approved by the majority of electors voting". That is obviously what one assumes when one is thinking in terms of carrying a repeal; but that is not what the section appears to say, and Perdue J.A., in the passage just quoted, reads it as negativing the law "if such law is not approved by a majority". On equal division an Act of the Legislature brought before the voters fails. That is not what is normally understood by repeal, but the Privy Council had the idea of repeal firmly in mind, and so altered the terms of the statute in its reading of it.

What, then, do the Privy Council and Appeal Court decisions say about a voters' negative, or a requirement of voter concurrence? Only that when framed as a power in the voters to repeal statutes, it is a legislative power which infringes the rights of the Crown when the latter is not added as a participant. But the rights of the Crown are fully respected when the referendum is added merely as an extra condition, be it precedent or even subsequent: so that referenda of these varieties, if they are to be condemned at all, must be condemned on grounds upon which the Privy Council reserved judgment, which we shall next consider.[35]

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33. (1916) 27 Man. R. 1 at p.8.

34. Ibid., p.29. Emphasis added.

4) The Positive Referendum (Initative) and the Lieutenant-Governor's Powers

Far more obvious are the grounds on which the Initiative--the voice of the electors enacting laws themselves--the positive power of legislation by referendum--can be thought to infringe the Lieutenant-Governor's powers. For here, the Initiative allows a law to be brought to the statute books without his consent. That, of course, is the gravamen of the charge that the Initiative and Referendum Act interfered with his powers. Yet, even to this charge, an answer may be offered in support of the validity of the scheme: and that argument is that the referendal legislation here in question was merely such a delegation as could be made in accordance with Hodge v. The Queen to a body of which the Lieutenant-Governor formed no part. If delegation could be made out, it would obviously serve as a rather forceful answer to both the charges brought against the Initiative and Referendum Act; namely, (1) that the Crown, represented by the Lieutenant-Governor, had been wrongfully excluded from participation in the lawmaking process; and (2) that lawmaking powers exercisable under s. 92 ff. of the B.N.A. Act, by the "Legislature" exclusively, had been invested in a body other than a "Legislature" within the meaning of that Act.

Delegation is, of course, as relevant an answer to (1) as to (2). If municipal councillors or municipal voters can act in exercise of delegated legislative powers without constitutional necessity for royal assent, so too, one would think, could the voters of the province; and if so, any objection to a delegation to the voters will have to be founded on grounds other than (1). Curiously, discussion in the judgments seem to proceed as if delegation were offered in answer only to objection (2).

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35. An examination of the remarks of Viscount Haldane [1919] A.C. 935, at p.945 about section 12, which he seemed inclined to sustain apart from its last sentence, may seem to cast doubt on the foregoing. His Lordship was in effect suggesting that the Legislature might require that the operation of its statutes be delayed for a time save where two-thirds of the Assembly voted for immediate operation. And his Lordship was suggesting that the last sentence was bad, i.e., that the operation of the statute could not be made conditional upon voter approval. Does this mean that no statute

Does this mean that, as the Privy Council reserved judgment on objection (2), they therefore reserved judgment on the preliminary question whether the powers given to the electorate could be sustained as a delegation? Clearly not. It is clear that most of the discussion about delegation was in both courts addressed to objection (2). Yet the passages quoted above from the Privy Council opinion make it clear that in their view the lawmaking powers conferred upon the electors were of quite another order than those which Hodge v. The Queen had held could be placed in a body which, in that case, was independent of any requirement of royal assent to its acts. Rejection of the 'delegation' argument is implicit in the Privy Council's judgment; because its acceptance would have involved sustaining the Initiative and Referendum Act. But rejection is more than implicit: it is explicit. It is explicit in the distinction drawn by their Lordships[36] between a provincial legislature which 'while preserving its own capacity intact, seek[s] the assistance of subordinate agencies' and one which tries to 'create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence'. The Privy Council may be leaving open the constitutional legitimacy of the latter as regards circumstances where the Crown's rights are respected; but they do not doubt that it is the latter that is being attempted. And in the Court of Appeal, as we shall see, even Cameron J. who, unlike his brethren, would have sustained the latter type of experiment--provided the Crown were respected--entertained no doubt that this was what was being done.[37] The remaining judges of the Court of Appeal who delivered judgments made it equally clear that they did not

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may be made conditional on voter approval; or, at least, that the province cannot impose a referendum as a requisite to some or all legislation, i.e., cannot entrench by referendum? Viscount Haldane, having expressed his view, seems to reserve it in the next breath as 'unnecessary to decide'. In any event, that passage, if governed by the context of the judgment, is obviously made on the basis that the last sentence of s.12 has to do with a referendal repealing process in which the Crown is ignored.

consider the matter one of delegation.[38]

The distinction between delegating legislative power to a subordinate and investing it in a new legislative power may not be a clear one; and the criteria for the distinction may be hard to find or unsatisfactory, but it is, it would seem, necessarily implied in the Privy Council decision here, that there is a line to be drawn.[39] On one side powers may be given in whose exercise the Crown plays no part: Hodge v. The Queen. On the other side of the line the assent of the Crown must be provided for: In re Initiative and Referendum Act. Of course, what amounted to a scheme to derogate from the Lieutenant-Governor's authority as representing the Queen who is the supreme executive government of the province, might be ultra vires; or to the extent that it was intra vires, it might be the subject of remedial legislation by Parliament in relation to the office of Lieutenant-Governor, a subject excluded from the provincial legislative authority.

It is submitted accordingly, that the Courts rejected the Initiative and Referendum Act, not because the general body of voters was less capable than anyone else of taking a delegation of powers; nor because, on taking a delegation of powers, they would be more bound than any other delegate to have the assent of the Lieutenant-Governor as part of their procedure; but precisely because, in the view taken by the Courts, the Act purported to vest such equal and co-ordinate legislative power in the body of electors as could not be regarded as a mere delegation to a subordinate--just as the Parliament Acts, 1911 and 1949, in the United Kingdom, cannot be regarded as a process for

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36. [1919] A.C. 935 at p.945.

37. (1916) 27 Man. R. 1 at p.35.

38. See below in connection with objection (2)--infringement of the implied requirements of a "Legislature."

39. See above I(5) and I(6) and below III(6); ante, pp. 365-66; and post pp.386 ff.

the passage of anything less than a fully-fledged Act of Parliament. It followed, then, once a new legislative power was assumed to have been created, that the Lieutenant-Governor's exclusion therefrom was an interference with his powers, rendering the Initiative and Referendum Act ultra vires,[40] apart any other ground.

5) Referendal Legislation and the Requirements of a "Legislature"

The second principal ground of objection to the Initiative and Referendum Act was, of course, that the new legislative power was not a 'Legislature' within the meaning of the British North America Act, the term being taken to import impliedly some few or many characteristics, actual or ideal, of English parliamentary government. The voters, it was said, were no "Legislature".

Upon this point, the Privy Council expressly reserved judgment; but appeared nevertheless favourably disposed to it:[41]

> 'Having said so much, their Lordships, following their usual practice of not deciding more than is strictly necessary, will not deal finally with another difficulty which those who contend for the validity of this Act have to meet. But they think it right, as the point has been raised in the Court below, to advert to it. Sect.92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature, and to that Legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it as ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in Hodge v. The Queen, the Legislature of Ontario was held

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40. Perdue J.A. (1916) 27 Man. R. at p.31 would have gone so far as to find that even had a requirement of royal assent been included, there would still have been an illegal interference with the office of Lieutenant-Governor: 'Even if it could be shown that section 7 did imply that the assent of the Lieutenant-Governor should be obtained, or if the Act were amended so as to make it clear that such assent was required under both sections 7 and 11, the Act would still remain unconstitutional, because, as I have pointed out, the Lieutenant-Governor can only assent to an Act that has been passed by the Legislative Assembly.' This would seem for example to doubt the generally-accepted right of the provincial legislatures to invest in the Lieutenant-Governor powers germane to the office: A.-G. Can. v. A.-G. Ont. (1891) 20 O.R. 222 at 247; and see (1893) 19 O.A.R. 31; (1894) 23 S.C.R. 458. Shannon v. Lower Mainland Dairy Products Board [1938] A.C. 708, at p.722. It is interesting to compare Manson J.'s attempt [1937] 2 W.W.R. 401, esp. 416-421 to extend In re Initiative and Referendum Act. C.f. Credit Foncier v. Ross (1937) 2 W.W.R. 353, 357-8. See also Re Land Registry Act and City of Vancouver (1956) 5 D.L.R.

> entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than call attention to the gravity of the constitutional questions which thus arise.'

The judges of the Manitoba Court of Appeal were not, as we shall see, so reticent; and, with the exception of Cameron J.A., all the judges who rendered opinions found this another ground of ultra vires.

For obvious reasons, discussion circled around the proper application of Hodge v. The Queen[42] which their Lordships gave the most anxious consideration. Could the delegation in that case cover a situation like the present, and, if not, could the remarks about provincial legislative sovereignty justify an extension of the principle there laid down, or influence the court in its interpretation of the breadth of the provincial constitutional amendment power? The judges obviously felt bound to approach the Hodge decision virtually as revealed truth, weighing every dictum found in it as if it were a provision in an Act of Parliament, and offering explanations in tones most cautious and deferential.[43]

It is clear from the judgments in the Court of Appeal that all those who delivered opinions considered--and in this they were in accord with the Privy Council--that the Initiative and Referendum Act did not purport so much to effect a delegation to a subordinate as to effect a vesting of equal legislative power in a co-ordinate authority.[44]

(2d) 512; A.-G. N.S. v. A.-G. Can. and Lord Nelson Hotel Co. [1951] S.C.R. 31.

41. [1919] A.C. 935 at p.945.

42. (1883-4) 9 App. Cas. 117.

43. See Howell C.J.M. (1916) 27 Man. R. 1 at p.2 ff; at p.8; and Richards J.A. at p.10 ff.

44. Per Howell C.J.M. (1916) 27 Man. R. 1 at p.6: 'If the proposed Act is within the powers of the Legislature, then all powers of legislation could be taken from the Legislative Assembly and given to the democracy...'

But, unlike the Privy Council, they were not so reticent in pronouncing upon the constitutional validity of such a scheme. Thus, Howell C.J.M.[45] accepted this ground of ultra vires:

Richards J.A. distinguished the power to delegate (at p.10): 'In Canada we have cases, such as Hodge v. The Queen, which declare that Provincial Legislatures may, as to minor details, delegate limited powers of legislation to bodies created by, or by authority of, those Legislatures, or may permit localities to decide whether or not certain Acts, such as those regulating the sale of intoxicating liquors, shall be in force in such localities.

'Those powers so given, are, however, merely in the nature of policing regulations. They do not interfere with or purport to cause others to take the place of, or perform the functions of, the legislature.'

He characterized the referendal processes thus, by contrast: (p.13) 'What is the limit of the power of amendment so [s.92(1)] given? If it permits the passing of the Act in question it must go so far as to allow the Legislature to create a completely new constitution based not on the sovereignty of Parliament but on that of the people, and which can control and render nugatory the acts of the Legislature itself.' [Emphasis added.]

Or, again, (at p.14), he said: '...the amendments that may be made under s.-s.(1) must necessarily be such that they do not purport to destroy or take away or give to others the lawmaking powers of the Legislature.' [Emphasis added.]

The above-mentioned viewpoint emerges very clearly from the remarks of Perdue J.A., (at p.23): 'The procedure for enacting laws provided by the new Act would, where it was invoked, override or have equal force with the system of legislation provided by the constitution.' [Emphasis added.]

Again, distinguishing Hodge v. The Queen (at p.24): 'It is obvious that the power of delegation referred to in the above is very different in principle from that claimed in the present case. The proposed Act has for its object the creation of a new legislative power which will initiate and pass legislation which hitherto the Legislature alone could enact. This is not a delegation of authority for the purpose of making by-laws or rules to aid in carrying an enactment into effective operation. It is an effort to endow another body with the same power of making laws that the Legislature itself possesses. [Emphasis added.]

Also, (at p.25), 'I cannot believe that No.1 [of s.92] was intended to give to the Legislature the power of abolishing itself, or conferring on another body its power of enacting laws, or the power of abolishing the Legislative Assembly so that only the Lieutenant-Governor would be left.'

Again (at p.26); 'It cannot, in the guise of an amendment to the constitution, completely abolish the representative chamber in the Legislature or suspend its law-making functions or delegate them to another body of its own creation.'

Again, (at p.26) 'There are many authorities showing that an Act may legally provide that the time and manner of its taking effect may depend upon a vote of electors, or a proclamation of the government...This is not a delegation of the powers of legislation. By the Act now in question, even where the Legislature should act on the petition under section 4 and itself pass the proposed law, it would be bound to do so without any change that would alter the meaning of such proposed law. In this way the Legislature would tie its own hands in respect of any matter which the electors, or the designated percentage of them, appropriated as a subject for legislation. This, it appears to me, would be an abdication by the Legislature of its legislative powers, rather than a mere delegation of them.'

'The law-making power, is by section 92, vested in the Legislature, and that is reitereated in section 91. The proposed Act provides that any person may draw a bill and get a petition signed by at least eight per cent, of the electors supporting it and may force that bill to an election and, if carried on a vote of the electors, it will become law, even against the will of the Legislative Assembly. I cannot think that such a proceeding is the Act of a Legislature within the meaning of section 92. I feel safe in stating that no person in the Imperial House, and none of the statesmen in Canada who advocated the legislation, ever intended that power should be given to Canada or the Provinces to enact laws otherwise than through or by a body of men who were in some way the representatives of the people, and with whom the representative of the Crown could meet and discuss matters requiring legislation and thus consider his assent thereto in the King's name;'

and so did Richards J.A. who said inter alia:[46]

> 'The section does not say that the Legislature or any body it may substitute for itself, whether such body substituted is or is not a Legislature, may make laws, &c. It says that "the Legislature may exclusively make laws", &c., for each of these 16 different classes of subjects.'...'Our legislature consists of the Lieutenant-Governor and the Legislative Assembly. To substitute the popular vote for that of the Legislative Assembly would leave us without a Legislature.'
>
> Perdue J.A. was of like opinion:[47]
>
> '...[T]he Act sufficiently shows that the Legislature provided for each Province is the only provincial law-making authority to which legislative power has been assigned over the subjects mentioned in section 92. I think one may safely assert that neither the framers of The British North America Act nor the Imperial Parliament that passed it ever contemplated the creation by the Legislature of a new legislative body such as that sought to be created by the "Initiative and Referendum Act", to which

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And Cameron J.A., though not finding it objectionable on that account, characterized it similarly (at p.35): 'Can the Legislature create within the Province a new Legislature or law enacting body not already created or authorized by the British North America Act? That is no doubt the intention of the Act before us. In certain matters it is intended that laws should be enacted not by the Legislature but by the general body of the electors. It does not purport to abolish the Legislature. But it does purport to create a method of enacting laws without the approval of the Legislature.' [Emphasis added.]

45. (1916) 27 Man. R. 1 at p.7.

46. Ibid., p.14 and p.15.

47. Ibid., at pp.21, 23 and 26 respectively.

body the Legislature would delegate its powers of legislation, or with which it would share them.'

'From other portions of the Act dealing with the constitution of the provinces it is abundantly clear that the law making power in each province was entrusted to a Legislature which must consist of a Lieutenant-Governor and a Legislative Assembly at least, whether there is a Legislative Council or not.'

'But there must be a Legislature and the laws must be enacted by a Legislature. It cannot, in the guise of an amendment to the constitution, completely abolish the representative chamber in the Legislature or suspend its law-making functions or delegate them to another body of its own creation.'

Cameron J.A., on the contrary, expressed the view[48] that:

> 'it would appear that the Legislature can do as it sees fit in delegating or transferring the law making power with the exception stated in the section [i.e., the office of the Lieutenant-Governor],'

because[49]

> 'The wording of sub-section one being apparently clear and explicit, why should it be assumed that the Provincial constitution, if and when and as amended by the Legislature, must still conform to the general constitutional provisions of the British North America Act, or to the general scheme of parliamentary or representative institutions existing in Great Britain at the time of its passage. I confess I see great difficulty in answering in favour of such assumption,'

but nevertheless at last reserved his opinion thereon, as[50]

> 'it does seem that they can be regarded as largely speculative and that the questions here submitted may be answered without reference to them'

and it sufficed to find interference with the office of Lieuten-

ant-Governor.

6) Primary and Delegated Legislative Power

If it be permissible to provincial legislatures to vest lawmaking powers by "delegation" in a "subordinate", even on terms under which the Lieutenant-Governor's concurrence is not required for exercise of the delegated powers, and even though the delegate be in no sense more a "Legislature within the

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48. Ibid., p.36.

49. Ibid., p.37.

50. Ibid., p.37.

meaning of the B.N.A. Act" than are the electors, we are bound to ask ourselves what is the precise difference between a principal exercising primary power and a subordinate exercising delegated authority, for that is the distinction suggested by the Privy Council and made by a majority of the Court of Appeal for Manitoba. Unless we are to say that the body of electors are less capable of receiving a delegation than anyone else--a proposition for which there seems little to be said, especially if municipal electors can receive such delegations--the grounds on which the Initiative and Referendum Act must be impugned must be based on the sole ground that the electors had been given primary legislative power as principals rather than subordinate legislative power as delegates, thus raising the objections that they purported to be a Legislature-without-Lieutenant-Governor and a body-not-meeting-the-test-of-a-legislature-under-section-92.

The difference between primary and delegated legislative power is not at all an easy one. In a rough way, it may be said that a delegate may not alter the terms of his delegation, which may always be revoked. In some sense the analogy is one of private-law agency, and the metaphor one of hierarchy. Yet the unreality of the hierarchical notion becomes apparent on closer examination, when it is realized that every exercise of legislative power (not to mention other power) has constitutional consequences, which differ only in being more or less obvious or obscure, more or less proximate or remote. The merest delegate, seemingly at the bottom of the heap, can, by his legislative--or indeed administrative or judicial--acts, produce consequences with legal force and effect, determining who may exercise lawmaking power, and the manner in which they may validly exercise it. What change in private law does not, directly or remotely, affect the solvency of members in a legislative assembly, and therefore their qualifications as such? More obviously, a board empowered to vary electoral boundaries by its acts strips of legislative power electors and representatives who otherwise would wield it, and it does so irrevocably, at latest, once by dissolution of the house or otherwise the

opportunity to undo the Board's work is lost: for now only those who newly wield power can restore the old order. Who of those who march under the maxim that "Parliament cannot bind itself" can doubt that the great Reform Act irrevocably put the lawmaking power into new hands--redefined the lawmaking process?

A delegation would seem characterized by restricted scope of authority and restricted power to turn against the authority which made the delegation--to destroy the latter to alter it, to take away its power to revoke. But a striking illustration that such differences are primarily quantitative rather than qualitative will be found in the fact that, in 1939, a member of the U.K. House of Commons, one Captain Ramsay, was placed in preventive detention by the House Secretary,[51] exercising the authority conferred on him by Regulation 18B of the Defence (General) Regulations, made by the Queen in Council under the Emergency Powers (Defence) Act, 1939. Here a 'delegate' acted with the most drastic effect on the constitution of the 'principal', Parliament.

It is not therefore an easy matter to say at what point, or why, powers conferred by a provincial legislature transcend mere delegation, and become something which the Courts suggest is somehow of a different order altogether. Yet, unless the decision In Re Initiative and Referendum Act is simply a holding that electors cannot take a delegation, it turns on the distinction just considered; and the decision cannot be explained away on any such basis as inability of electors to take a delegation: first, because this was never suggested; second, precisely because the Courts denied that the situation was one of delegation at all, insisting instead that the scheme intended a true legislature, but without including the Crown, or without conforming to the B.N.A. Act, or both.

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51. (1939-40) H.C. Pap. 164.

7) The Holding in Re Initiative and Referendum Act[52]

What, then did the case decide?

(1.) It is submitted that it is authority, as well in the Privy Council as in the Manitoba Court of Appeal, for the proposition that a provincial legislature cannot vest (primary) powers of legislation in any authority, including the electors, without providing for presentation to the Lieutenant-Governor for Royal Assent; though, under Hodge v. The Queen[53] a body may, as delegate, be given the exercise (by itself and without need of Lieutenant-Governor's concurrence) of subordinate or delegated powers.

(2.) The same is true as regards vesting a power to enact repealing laws; but the case is not authority against the power of a provincial legislature to impose the consent of another body (whether another assembly or the body of electors) either as a condition precedent or as a condition subsequent to the enactment of some or all classes of laws. (Such a case, it would appear, is governed by A.-G. N.S.W. v. Trethowan).[54]

(3.) There is the authority of the Manitoba Court of Appeal, by a majority, but not of the Privy Council, for the proposition that, even if the position of the Lieutenant-Governor be respected a provincial legislature cannot vest in certain bodies, of which the electorate is an instance, primary powers of legislation, because such bodies will not be "Legislatures" within the meaning of the B.N.A. Act: the term "Legislature" is on this view not wide enough to embrace every manner of lawmaking authority, but such only as possess some as yet unsettled set of determining characteristics, actual or ideal, of English parliamentary government.

(4.) There is an obiter dictum of the Privy Council, not quite approving proposition (3), but declaring that the contrary does not flow from Hodge v. The Queen.

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52. [1919] A.C. 935; on appeal from (1916) 27 Man R. 1.

53. (1883-4) 9 App. Cas. 117.

(5.) There seems to be no holding that the electors are less capable than anyone else of taking a true delegation.

IV. THE CONSULTATIVE REFERENDUM AND THE PROVINCIAL CONSTITUTIONS

1) The Direct Legislation Act of Alberta

R. v. Nat Bell Liquors Ltd.[55] raised the question of the constitutional effect of "An Act to provide for the Initiative or Approval of Legislation by the Electors", which received Royal Assent in Alberta on March 25, 1913, with the short title "The Direct Legislation Act".[56] This statute did not empower the electors of their own motion to enact or nullify laws, but gave voters in more diluted form both a negative and positive voice. But the operation of statutes passed in the ordinary way might, under section 3, be postponed--if the Legislature so provided--until the ninetieth day after the close of the session; whereupon, by section 4, ten per cent of the electors satisfying certain conditions might pray for its reference to a vote of the electors; with the result that the operation of the statute would by s. 5 be further deferred to turn on the result of the vote, which, if favourable, would allow the statute to be proclaimed in force under s. 23. Section 6 provided a limited initiative, allowing twenty per cent of the electors meeting certain conditions to petition the Legislature to pass a proposed Act, which, if not enacted at the session to which it was presented, would be submitted under section 7 to the voters; and if approved by them, section 24 provided that:

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54. [1932] A.C. 526.

55. [1922] 2 A.C. 128; (1921) 16 Alta. L.R. 149.

56. Stat. Alta. 1913, 1st sess., c. 3. Amended by The Statute Law (Amendment] Act, 1913, (Second Session), S.A. 1913 (2) c.2, s. 25 [October 25, 1913]. Further amended by The Equal Suffrage Statutory Law Amendment Act, S.A. 1916, c.5, s.2 (7) [April 19, 1916] . As revised and amended, it appeared in R.S.A. 1922, c.6. Amended by An Act to amend The Direct Legislation Act, S.A. 1923, c. 7 [April 21, 1923]. Amended by The Direct Legislation Act Amendment, 1931, S.A. 1931,

> 'the said proposed statute shall be enacted by the Legislature at its next session without amendment, save such amendments as may be certified to by the Speaker as not constituting a substantial alteration therein, or as not changing the meaning, effect or intent thereof, and notwithstanding the provisions of section 3 hereof shall come into force upon receiving the royal assent...'

The Act thus envisaged that the Legislature might of its own volition when it saw fit subject the operation of particular statutes to the will of the electors, and provided the appropriate machinery for consultation. This aspect of the act did not come before the courts, but it would seem valid conditional legislation, and drew no adverse comment when the Privy Council discussed the Act.

The Alberta statute is obviously much weaker than the Manitoba legislation for, unlike the latter, the former (1.) leaves the Alberta Legislature free to decide in each case whether it will postpone the operation of a statute under section 3 to allow for consultation; and (2.), in particular, allows an act repealing the Direct Legislation Act to be immediately operative, without any opportunity for the voters to force it before them as, under the Manitoba statute, the voters could do [unless two-thirds of the Assembly could be found to vote the urgency preamble which (under s.12 of the Initiative and Referendum Act) would in Manitoba be necessary to bring into immediate force (inter alia) an Act to repeal the Initiative and Referendum Act.]

Accordingly, conditional legislation of this sort, even combined with an opportunity to consult the voters, seems permissible[57]--and no less so even if it be thought impermissible to give the voters a negative entrenched by a negative on any attempt to take it away.

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c.8 [March 28, 1931]. As revised and amended, appearing as R.S.A. 1942, c.7. R.S.A. 1955, c.84. Repealed by An Act to repeal Certain Acts of the Legislature, S.A. 1958, c.72 [April 14, 1958].

57. Russell v. The Queen (1882) 7 App. Cas. 829. In R. v. Walsh (1903) 5 O.L.R. 527, a Divisional Court of the King's Bench Division (Falconbridge C.J.K.B., Street and Britton JJ.) held intra vires the conditioning of the operation of The Liquor Act, 1902, 2 Edw. VII c.33 (Ont.), by s.2 thereof,

As regards an Initiative, the Alberta statute, though it did not empower the electors to bring their will to law directly, did by sections 6 and 7 allow a requisite number of voters to petition the Legislature to enact a law which they proposed, and, in the event of its failure to comply, have the matter put to the electorate. Approval by the electorate did not make the proposal law, but section 24 seemed to make it a matter of statutory duty for the "Legislature"[58] then to pass the measure without substantial alteration, which, on royal assent, would become law.

Whether such a statutory duty, if mandatory rather than directory merely, could be enforceable, and if so how--and, indeed, whether imposing such a legal duty, even if merely in abstracto, would not in fact amount to making the electors' will sufficient to legislation--was obviously not considered by the Board in the Nat Bell case; Viscount Sumner speaks as if there were a statutory duty. To find that the Direct Legislation Act imposes a statutory duty binding upon the Legislature, must immediately imperil the Act; for, the Lieutenant-Governor being part of the Legislature, the Act would thus purport to deprive the Lieutenant-Governor of his right to grant or refuse assent. Avoiding this hazard, by restricting the construction or operation of the word "Legislature" to the Assembly alone, still, a statutory duty even on the Assembly alone would make the will of the voters sufficient, with the assent of the Crown. It would seem immaterial whether recourse to the Courts must be had to enforce performance, for the Legislature, it must be assumed, or the Assembly, would consider itself bound to follow its statutory duty. And, if the voters, with the concurrence of the Crown, are by the Direct Legislation Act purportedly empowered to bring a measure to law, even by agent, that, of course, raises exactly the question of validity reserved by the

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upon a province-wide referendum. Similarly Rex v. Carlisle (1903) 6 O.L.R. 718 (C.A.: Moss C.J.O., Osler, Maclennan, Garrow and Maclaren JJ.A.).

58. Presumably meaning the "Assembly". The statutory duty obviously could not validly include the Lieutenant-Governor.

Privy Council, and decided--adversely--by the Manitoba Court of Appeal In re the Initiative and Referendum Act.

But looking at it as a whole, it seems absurd to take the Privy Council decision,[59] sustaining certain liquor legislation passed by the Alberta Legislature in pursuance of the popular will expressed under The Direct Legislation Act, as being a deliberate decision on the question earlier reserved by the Privy Council. There is no suggestion that their Lordships addressed their minds to the consideration of this last issue. Nor can we even say that the question--i.e., whether voters plus Crown could be a "Legislature" within the B.N.A. Act--was even implicity decided here, sub silentio. For the remarks of Lord Sumner, assuming though they did a statutory duty on the part of the Legislature to pass the impugned liquor act:[60]

> 'it is none the less a statute because it was the statutory duty of the Legislature to pass it,'

would be even more true were the supposed statutory duty non-existent or unenforceable. The liquor legislation was attacked, said Lord Sumner, on the ground that it had not been made by the provincial Legislature which "exclusively" had power under the B.N.A. Act, because it had been made partly also by the people of Alberta. Indeed the part played in the matter by the Legislature was practically only formal.' His Lordship continued:

> 'It was further argued that the Direct Legislation Act was itself ultra vires on the ground that it altered the scheme of legislation laid down for Canada by the British North America Act, a scheme which vests the Provincial legislative power in a Legislature, consisting of His Majesty, as represented by the Lieutenant Governor, and of two Houses, or in some Provinces one House, and introduced into it a further

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59. [1922] 2 A.C. 128.

60. [1922] 2 A.C. 128 at p.134.

and dominant legislative power in the shape of a direct popular vote taken upon a Bill, which the statutory legislature must pass, whether it really assents to it or not.'

His Lordship answered these contentions thus:

'On the first point it is clear that the word "exclusively" in s.92 of the British North America Act means exclusively of any other Legislature, and not exclusively of any other volition than that of the Provincial Legislature itself. A law is made by the Provincial Legislature when it has been passed in accordance with the regular procedure of the House or Houses, and has received royal assent duly signified by the Lieutenant-Governor on behalf of His Majesty. It is impossible to say that it was not the Act of the Legislature...',

adding, rather tartly,

> 'If the deference to the will of the people, which is involved in adopting without material alteration a measure of which the people has approved, were held to prevent it from being a competent Act, it would seem to follow that the Legislature would only be truly competent to legislate either in defiance of the popular will or on subjects upon which the people is either wholly ignorant or wholly indifferent. If the distinction lies in the fact that the will of the people has been ascertained under an Act which enables a simple project of law to be voted on in the form of a Bill, instead of under an Act which, by regulating general elections, enables numerous measures to be recommended simultaneously to the electors, it would appear that the Legislature is competent to vote as its members may be pledged to vote individually, and in accordance with what is called an electoral "mandate", but is incompetent to vote in accordance with the people's wishes expressed in any other form.'

It is precisely in such words as 'deference', and in the view expressed that the Direct Legislation Act did not formally interfere with the functioning of the Legislature, that it becomes plain that the Board was not proceeding on the basis that a statutory duty existed, or at least not a mandatory one; for a true statutory duty would in law constitute a formal interference with the operation of the Legislature, and wholly exclude the idea of mere 'deference':[61]

> 'Unless the Direct Legislation Act can be shown, as it has not been shown on this occasion, to interfere in some way formally with the discharge of the functions of the Legislature and its component parts, the Liquor

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61. [1922] 2 A.C. 128 at p.135.

> Act, 1916, being in truth an Act duly passed by the Legislature of Alberta and no other, is one which must be enforced, unless its scope and provisions can themselves be shown to be ultra vires. As for the Direct Legislation Act, its competency is not directly raised in the present appeal. What was done in this case was done under the Liquor Act, and if that Act is sustained there is no utility in going behind it to decide the validity of another Act, which merely conditioned the occasion on which the Liquor Act was duly passed.'

2) The Holding in the Nat Bell Case[62]

At most the Privy Council decision here holds, it is submitted, that an Act passed by a provincial legislature is not invalid by reason of its 'deference' to the will of the electors in enacting, even in pursuance of statutory direction, a law approved by the electors on referendum: provided that there is no formal interference with the discharge of the functions of the Legislature or its component parts. The Privy Council even seems unsure as to whether it is ruling on the validity of the Direct Legislation Act, though such a ruling would indeed seem to be involved to the extent that they are holding that the Direct Legislation Act does not have such an operation as would vitiate the Liquor Act passed in pursuance of it. But that, of course, is perfectly consistent with the view that the Direct Legislation Act--for whatever reason--did not or could not validly make the Assembly the puppet of the voters in the juridical sense.

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62. In the Privy Council: [1922] 2 A.C. 128. In the Appellate Division of the Supreme Court of Alberta (Harvey C.J., Stuart and Beck JJ.): (1921) 16 Alta. L.R. 149, 173 one of Beck J.'s grounds of decision against the validity of the Liquor Act was the operation of the Direct Legislation Act, passage in pursuance of which, he thought, tended to show that the Act in substance dealt with public morals and criminal law. Referring to his remarks in Gold Seal Ltd. v. Dominion Express Co. (1920) 15 Alta. L.R. 377, at 406-7, he said: 'It was not my intention to hold that The Liquor Act was ultra vires merely because it had been passed in pursuance of The Direct Legislation Act, 1913, ch.3, which itself is, in my opinion, unconstitutional...' See the reasons of Hyndman J. who delivered the judgment a quo, and whose reasons were adopted by Harvey C.J., dissenting, on appeal: (1921) 16 Alta. L.R. at p.158, The opinion of Hyndman J. [1921] 1 W.W.R. 136, cited on the material point at (1921) 16 Alta. L.R. at p.158, disagreed with the contention that the law had not been made exclusively by the provincial legislature. Distinguishing the Manitoba decision, his Lordship said: 'It is clear that the ratio decidendi in that case was the interference by the local

V. PROBLEMS SUGGESTED BY THE AMERICAN EXPERIENCE AND THE CANADIAN AND AUSTRALIAN CASES

Since judicial review of legislation in the United States is considered to have been definitively established on the basis of a case which is, if it is anything, a plea that the law must be made in accordance with the law, and not otherwise,[63] one may be forgiven for thinking somewhat schizophrenic judges who hold, in effect, that whilst the Constitution means what the Court says it means, it contains whatever the Congress says it contains.

The cases[64] dealing with the U.S. constitutional amendment process show considerable ambivalence towards the enforcement

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Legislature with the office of Lieutenant-Governor. The position in this province is entirely different. The functions of the Lieutenant-Governor are not in any way affected. Although a vote is taken...in Alberta under the provisions of the Referendum Act it is, in my opinion, a plebiscite merely. Before such a proposed measure becomes law it must be presented and pass through the stages common to all other bills in the properly constituted Legislature and must finally receive the assent of the Lieutenant-Governor. This Act having passed through all these necessary stages and formalities I do not think it is open to show that the legislators had abdicated their functions or to inquire into the reasons why they voted for the measure and the bill having received the Royal Assent, in my opinion, became validly enacted.'

63. Marbury v. Madison (1803) 1 Cranch 137; 1 L. ed. 368.

64. In Hollingsworth v. Virginia (1798) 3 Dall. 378; 1 L. ed. 644, a decision which one may observe preceded Marbury v. Madison, the validity of the Eleventh Amendment (restricting the judicial power of the United States) was challenged on the grounds that it had not been submitted to the President for his approval before ratification. The Supreme Court unanimously held the amendment "constitutionally adopted". There seems to have been no suggestion that this question was not one perfectly proper to consider and determine like other questions of law.

Since this decision the Supreme Court has had occasion to consider a great variety of germane problems. In giving some of those most directly relevant, I have made no attempt at being exhaustive.

In Ohio ex rel. Davis v. Hildebrant (1915) 21 U.S. 565, 60 L. ed. 1172, it was held that where by the constitution of a state, legislative authority was vested not only in a general assembly, but in the people exercisable by referendum, popular action could validly constitute legislative action within Art. 1, sec. 4, of the Constitution of the U.S., under which U.S. congressional and senatorial elections are (subject to certain Congressional legislation) regulated "in each state by the legislature thereof".

of legal continuity--of lawmaking according to law--which is, perhaps, attributable to (1) "federal" considerations extending to a right in the states to control their own legal orders or continuity, or breach or overthrow them [the problem is that the

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In Hawke v. Smith (1919) 253 U.S. 221, 64 L. ed. 871, reversing 100 Ohio St. 385; 126 N.E. 400, the Supreme Court held that the provisions of a state constitution reserving to the people the exercise of the power to ratify Amendments to the United States constitution, conflicted with Article V of that Constitution, respecting Amendments, because popular legislation could not constitute a Legislature within the meaning of that Article.

This proposition was put without qualification even though, as the representative legislature had ratified despite the purported provision of the state constitution, and as the Eighteenth Amendment had been proclaimed with Ohio's ratification amongst the necessary number, the Supreme Court had only (if the question was the validity of proceedings connected with the Eighteenth Amendment) to consider whether the representative legislature's ratification was valid; not whether a popular ratification would have been invalid; especially in view of doctrines of Congressional recognition of state authorities and later doctrines of Congressional supervision of the amending process.

But the litigation had challenged the expenditure of public monies for a referendum. This expenditure was upheld below, and the judgment below was reversed by the Supreme Court. This goes therefore so far as to suggest perhaps that even consultative referenda are illegitimate. Compare R. v. Nat Bell Liquors Ltd. [1922] 2 A.C. 128 Supra p.557 ff., especially the rather tart passage from Lord Sumner's remarks, quoted above p.560.

In Rhode Island v. Palmer ("National Prohibition Cases") (1920) 253 U.S. 350, 64 L. ed. 946, the two-thirds vote of each House required to propose a constitutional amendment was construed by the Supreme Court to mean two-thirds of those present, assuming however a quorum. Referendum provisions of state constitutions could not be applied in ratification or rejection of amendments.

In Dillon v. Gloss (1921) 256 U.S. 368; 65 L. ed. 994 the Court per Van Devanter J. held Article V of the Constitution to imply that amendments must be ratified within some reasonable time after their proposal; that Congress might in proposing an amendment fix a reasonable time; and that the seven years fixed by Congress in the resolution proposing the Eighteenth amendment was reasonable.

"First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three fourths of the States, there is a fair implication

state legislatures produce in an infinity of ways juridical

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that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which, of course, ratification scattered through a long series of years would not do." 256 U.S. 368, 374.

Judicial notice would be taken of ratification, and an amendment had effect from the date of consummation of ratification, and not that of its proclamation [by the Secretary of State under the then rule] which latter date was immaterial.

In Leser v. Garnett (1922) 258 U.S. 130, 66 L. ed. 505, the Court held the function of ratification by state legislatures of amendments to the United States Constitution to be a federal function, transcending any limitations sought to be imposed by a state, and the Nineteenth Amendment to be duly ratified and part of the Constitution. It had been contended that the ratifying resolutions of Tennessee and West Virginia were "inoperative, because adopted in violation of the rules of legislative procedure prevailing in the respective states... As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts."

It may be observed that the earlier decisions all presupposed that the requirements of Article V of the Constitution were subject to construction and enforcement by the courts. From the time of this judgment (delivered by Brandeis J.) a conflict between this view and a contrary trend, is discernible.

It is submitted that the decision begs the question as to the enforcement of rules constitutive of the state legislature, and determinative of whether action may be properly imputed to the state legislature in question. Insofar as the U.S. constitution invests the state legislatures with a federal function, it is vesting that function in complex legal structures, not in quasi-persons in respect of whom all rules are "limitations". And the attribution of conclusive "identifying" or "certifying" power to a series of clerks or executive officers is not only subversive of the legal system, but still does not avoid the problems of determining the competence of the certifying authority. Public authorities are not identifiable by having natural marks on their brows.

Coleman v. Miller (1939) 307 U.S. 433; 83 L. ed. 1385; in the court below 146 Kan. 390; 71 P. (2d) 518, arose out of events in the Kansas Legislature in connection with the ratification of a constitutional amendment, proposed by Congress in 1924, known as the Child Labour Amendment. The Kansas Legislature had in 1925 adopted and communicated to the U.S. Secretary of State, a resolution of rejection. In 1937 another resolution of ratification was introduced into the Kansas Senate, which body being equally divided, the Lieutenant-Governor as presiding officer cast a favourable vote. The Kansas House of Representatives by majority later adopted the resolution.

The twenty senators opposed, joined by another and by three members of the House of Representatives, sought mandamus in the Supreme Court of Kansas to compel the Secretary of the Kansas Senate to change his endorsement on the resolution to indicate failure of passage, and to restrain the officers of both Houses from signing the resolution, and the Kansas Secretary of State from authenticating it and delivering it to the Governor.

consequences not only in their own law but in the law of the

The grounds taken were that (i) the Lieutenant-Governor had no casting vote; (ii) the earlier Kansas refusal to ratify precluded subsequent ratification; (iii) the proposed amendment was itself stale as not having been ratified within a reasonable time after its proposal.

The Kansas Supreme Court held that the legislators were entitled to its judgment upon their claims, but rejected, them, and denied mandamus.

The U.S. Supreme Court (Hughes C.J., McReynolds, Butler, Stone, Roberts, Black, Reed, Frankfurter, and Douglas JJ.) upheld its jurisdiction to review on certiorari the decision of the Kansas Supreme Court, on the ground that the questions were federal, arising under Article V of the Constitution, and that the complaining Senators had a sufficient interest to maintain the proceedings, namely, their interest in the effectiveness of their votes. "This is not a mere intra-parliamentary controversy but the question relates to legislative action deriving its force solely from the provisions of the Federal Constitution, and the twenty senators were not only qualified to vote on the question of ratification, but their votes, if the Lieutenant-Governor were excluded as not being part of the legislature for that purpose, would have been decisive in defeating the ratifying resolution." 307 U.S. 433, 441. As the State court had entertained and decided these federal questions, the U.S. Supreme Court could review that decision on that interest.

In an opinion of Justice Frankfurter (in which Roberts, Black and Douglas JJ. joined), a minority denied that the petitioners had sufficient legal interest to have locus standi in the U.S. Supreme Court.

The objections listed as (ii) and (iii) above "...[in] no respect...relate to any secular interest that pertains to these Kansas legislators apart from interests that belong to the entire commonalty of Kansas. The fact that these legislators are part of the ratifying mechanism while the ordinary citizen of Kansas is not, is wholly irrelevant to this issue. On this aspect of the case the problem would be exactly the same if all but one legislator had voted for ratification." 307 U.S. 464; 83 L. ed. 1402.

"Indeed the claim that the Amendment was dead or that it was no longer open to Kansas to ratify, is not only not an interest which belongs uniquely to these Kansas legislators; it is not even an interest special to Kansas. For it is the common concern of every citizen of the United States whether the Amendment is still alive, or whether Kansas could be included amongst the necessary "three-fourths of the several States." 307 U.S. 465.

"We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake in it. One who is merely the self-constituted spokesman of a constitutional point of view cannot ask us to pass on it." 307 U.S. 467.

Nor, in the minority view, did the petitioners have locus standi upon (i), despite the analogy drawn to Ashby v. White, 2 Ld. Raym. 938; 92 E.R. 126; 3 Ld. Raym. 320; 92 E.R. 710, where an action in damages had been allowed upon the infringement of a franchise. "The reasoning of Ashby v. White and the practice which has followed it leave intra-parliamentary controversies to parliaments and outside the scrutiny of law courts. The procedures for voting in legislative assemblies--who are members, how and when they should vote, what is the requisite numbers of

United States; particularly, in the ratification of U.S.

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votes for different phases of legislative activity, what votes were cast and how they were counted--surely are matters that not merely concern political action but are of the very essence of political action..." 307 U.S. 469.

One may venture to observe that to allow the petitioners to found their claim on grounds (ii) and (iii) would indeed be to allow them to sue for determination rather of a question of law than of a legal right. If their contentions be correct upon grounds (ii) and (iii), the consequence ought in principle to be the nullity of the amendment if it depended on a Kansas ratification, or else the nullity of the amendment altogether in case (iii); which could be raised subsequently by persons whose rights might depend on the validity of the amendment if and when it was purportedly in force. That the Court might be reluctant to review the validity of a constitutional amendment even when the requisite pecuniary interest was present, is of course another matter: i.e., refusal for special reasons to consider otherwise relevant and properly-raised questions of law.

As regards locus standi upon (i), one would have thought that the U.S. constitution, in incorporating the action of a state legislature as part of the constitutional amending process, would incorporate the whole of the state machinery. It is hard to see at what point one is to refuse to incorporate part of the machinery, or why. Whether the machinery under Kansas law be a sergeant-at-arms to expel members disobeying the rules, or the interference of the law courts, would seem to be all the same; the right of any person to specific performance of any physical act or thing on the floor of the Kansas legislature would seem to be in the first instance a matter of Kansas state law respecting the legislature. And it is difficult to see why, if the Kansas state legislature be incorporated as part of the legal machinery of the United States, and if there is under Kansas law a right to a proper record of legislative action, specific performance of a proper record of legislative action enforced by the courts, should be any less incorporated than specific performance of orderly behaviour enforced by the sergeant-at-arms. And this, whether or not the sergeant or the Kansas Supreme Court be supposed to be exercising federal functions: even, indeed, if a state right to mandamus, become federal, were to be enforced in federal court.

The decision upon the merits was itself rather inconclusive.

Upon question (i)--the right of the Lieutenant-Governor to a casting vote--the Court said: "Whether this contention presents a justiciable controversy, or a question which is political in its nature and hence not justiciable, is a question upon which the Court is equally divided and therefore the Court expresses no opinion upon that point." 307 U.S. 447; 83 L. ed. 1393.

As regards (ii) the Court said: "We think that in accordance with...historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." Accordingly, on the "precise question as now raised", the Court should not "restrain the state officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political departments. We find no basis in either Constitution or statute for such judicial action." 307 U.S. 450; 83 L. ed. 1394.

These remarks prompt the following observations.

Constitutional amendments]; (2) doctrines allowing the political

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(1) It is not easy to see how Congress's "control" is consistent with notice by the courts of the contents of the U.S. constitution, and with the courts' giving effect to it as it stands on any given day, and particularly so since the prevailing doctrine has been that the courts, and in particular the Supreme Court, will notice ratifications and give effect to an amendment on the date of the last ratification. Indeed, the very necessity of any proclamation is a matter of doubt, and it is difficult to suppose that the high function of supervision has been conferred upon an official called the Administrator of General Services, who has by 65 Stat. 710-11 s.3; 1 U.S.C. 112, replaced the Secretary of State as proclaiming officer. And compare Dillon v. Gloss, supra.

(2) Assuming that only federal rights are involved, and the Supreme Court jurisdiction established, it seems somewhat unnatural to separate the question of the locus standi of petitioners from that of their right to the relief sought. It is not easy to see why there is more than one question: viz., the specific right, under the Constitution and laws of the United States or of the State, to the relief sought.

(3) The reasons given by the Supreme Court seem to extend well beyond merely holding that petitioners had no right to the relief claimed. Such a holding with respect to grounds (ii) and (iii) would indeed amount to no more than saying that a legislator has no right to restrain a purported ratification on the ground alone that the purported ratification would be void, whether void because of a previous rejection or void because the amendment itself was dead. This is perfectly plausible, and indeed legislators are not understood to have the right to apply to the courts in most jurisdictions, to restrain the purported enactment of invalid legislation.

The Court went much beyond this in suggesting that illegality of ratification is a ground of law which cannot be raised even when it is germane to an otherwise perfectly justiciable controversy before the courts. On ground (iii), "the Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications." 307 U.S. 456; 83 L. ed. 1397. The passage similarly disposing of ground (ii) has already been quoted above, at p. 399 supra, infine.

In short, not only is unlawful ratification not a ground of suit, it is not, according to the Court, a ground of law that can be raised in a suit.

(4) Even if the historical instance offered by the Court proves anything, it is a trifle incongruous to see the Court offering that which Congress has done in proof of its legitimacy.

As regards the length of time for ratification, question (iii), the Court said that it could not agree that in the absence of the fixing by Congress of a limited time for ratification, the Court should fix one. "[T]he question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments..." 307 U.S. 453; 83 L. ed. 1396.

organs of the U.S. to decide conclusively who are the lawful

One can fully agree with the Court that (at 307 U.S. 454; 83 L. ed. 1397) "In determining whether a question falls within that category [i.e. political and not justiciable questions] the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations" without coming to their conclusion that reasonableness is not here justiciable. The Court does not have to consider in every case what period is reasonable, but merely to hold that a given period is impliedly fixed by the constitution, even subject to Congressional variation. The common law, after all, fixed arbitrary time periods.

The concurring opinion of Black J., (for himself and Roberts, Frankfurter, and Douglas JJ.) was even more radical in tone. They said, 307 U.S. 458-9, 83 L. ed. 1398, "To the extent that the Court's opinion in the present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments, we are unable to agree." Thus they insisted that it was to Congress to decide even whether ratification must be had within a reasonable time, and not only what a reasonable time was. There was no "ultimate control over the amending process in the courts". "Undivided control ofthat process has been given by the Article exclusively and completely to Congress. The process itself is "political" in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." The Court should therefore express no views on the subject.

And as the legislative authority of the United States is exclusively confided to Congress, the same reasoning no doubt excludes the courts from judicial review of legislation!

Despite the need felt by four of the justices to express a separate concurrence, it is not easy to see precisely wherein consists the difference between their view and that of the Court. Both denied the justiciability of the question whether previous rejection precluded subsequent ratification. The following remarks are directed at both.

(1) It does not follow, even from the most unrestricted right of Congress to recognize or withdraw recognition from state governments, or to erect new ones, that the existing governments and laws are of anything less than full force and effect until so changed. Until so changed such governments and laws are recognized by the constitution of the United States, and by the Courts, for an infinity of purposes, including constitutional purposes, such as vested rights, which will be protected <u>even against Congress itself</u>. The doctrines respecting recognition and reconstruction of state governments do not therefore preclude the Courts from recognizing those from time to time in existence, and from insisting upon proper ratification in accordance with the laws for the time being in force.

(2) A legislature is not a natural, but a juridical, phenomenon, a legal structure. It is defined and created by law. The rules respecting casting votes are as much a part of the structure of a legislature as are, for instance, the rules which, in consequence of bicameralism, make the consent of a single house insufficient.

state governments--much as one government recognizes a foreign government--Congress being left, in sum, to decide just how much

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(3) If one is going to apply in a fair and honest manner the test of "satisfactory criteria for judicial determination" as one of the conditions of justiciability, it becomes perfectly plain that there is not the slightest difference between the inherent suitability for judicial enforcement, of the ratification process (exhaustion of power by previous ratification or rejection; casting votes; reasonable times; and any other matters), and the legislative processes of municipalities on the other hand. The subject-matter of the two is the same, and review of the latter is long known to the law. And can anyone doubt that satisfactory criteria for the resolution of such disputes are a thousand times easier to find than answers to such questions as, what is due process? what is equal protection? what is just compensation? what is freedom of speech? Surely these last, if any, are the non-justiciable questions, those for which criteria are lacking, and which are inappropriate for judicial determination. Those justices who with great facility consider themselves able to determine what is justice, freedom, equality or reasonableness, but balk at the matter of the right to a casting vote, or exhaustion of power, would seem to have a somewhat distorted sense of justiciability.

The doctrine of the political question makes much sense in, say, foreign affairs; but, so far as the 'inherent suitability' of the amending process for judicial review is concerned, the doctrine is a flimsy hoax. It boils down in the end to a view that the question is one where there is 'appropriateness of final determination by political authorities', or, in other words, that whatever persons may be in de facto occupation of the houses of Congress are the appropriate persons to determine finally what is the content of the United States Constitution.

But where, pray, have any such overwhelming reasons been offered as would justify the courts in giving less than its ostensible operation to Article V of the U.S. Constitution, namely, operation as a fully effective and enforceable part of the supreme law of the United States?

65. Luther v. Borden (1849) 7 Howard 1; 12 L. ed. 581 dealt with a revolution in Rhode Island and conflicting claimants to governmental authority. The Supreme Court took the view that it was to Congress to recognize state governments, and, under its authority, the President, who had in the present instance made a choice which the Courts were bound to follow. Secondly, the U. S. Courts were bound to follow the decisions of the State Courts on such matters.

One may observe that this latter proposition begs the question very likely to be in issue: who are the legitimate state courts? Moreover, the trouble with the first proposition is that, given the impact of state laws and acts on the composition of Congress and even on the Presidency, the composition of those called upon to decide the question presupposes in many cases a decision as to who are the public authorities of a state. The impact on the composition of the federal courts is likely to be much more remote and delayed.

state illegality, discontinuity or revolution there is to be;[65] (3) intimations or recollections of a revolutionary ideal suggesting that it is not the business of the Courts to enforce compliance with the constitutional amendment procedures as a condition of constitutional change or in other words to uphold the existing legal order against its overthrow: how this squares with the oath may well be a matter of conjecture.

The American authorities must be approached with great caution, in view of their very lax attitude towards the enforcement of legal continuity, to be contrasted with the rigorous attitude generally prevailing in modern times in the British Commonwealth, and in the Dominions in particular.

In a number of respects, however, they suggest problems that must be dealt with in Canada, under any Amendment Formula.*

(1) The recognition of provincial authorities. Our Courts are not entitled in principle to weaken in any respect their traditional attitude insisting upon rigorous enforcement of legal continuity. Nor in general can we think in terms of distinct federal and provincial legal orders: they would seem in principle all one under the B.N.A. Acts: so that there can in general be (it would seem) no question of a federal power to recognize or refuse to recognize provincial public authorities as if they were foreign states. This leaves open however a prerogative of the Crown to repair legal discontinuities, as for example to summon a new assembly where for some reason one had gone out of existence without there being otherwise valid machinery to summon a new one.[66] The Crown, as fons et origo

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The advent of the Reapportionment Cases, holding as they do that there are judicially-enforceable constitutional requirements for proper compostiion of state legislatures, necessarily attenuates the hitherto-unrestricted prerogative of the U.S. political authorities to recognize in whom they please the government of a state. The new doctrine is however consistent with an unrestricted negative on state authorities: Congress's curse may still be fatal though its blessing may not be the royal touch. But more than that, the Supreme Court not having held void everything done by irregularly-constituted legislatures, it follows that irregularly-constituted legislatures are considered legislatures none the less, albeit subject to a legally enforceable

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* For the draft constitutional amendment formulae for Canada, and their fate, see (1966) 12 McGill Law Journal 337-612, esp. 575 ff; and a white paper by Hon. Guy Favreau, Minister of Justice, The Amendment of the Constitution of Canada (Ottawa, 1965).

of all public authority, and vested with all residuary power, could summon a new assembly as it could before one had ever existed in a given territory. Equally open is the impact of federal laws--for example, criminal laws, laws dealing with war, invasion or insurrection, or remedial laws dealing with the peace, order and good government of Canada generally--on the constitution of provincial public authorities.

(2) Sufficiency of Provincial Consents. It is possible that Parliament might have been held to have power to rule upon the sufficiency of Provincial consents to constitutional amendments, the Fulton-Favreau Formula as drafted being silent on the subject. It would seem that Parliament could at least empower the courts to give immediate and definitive rulings on the subject, whether in virtue of its power with respect to the Supreme Court as a general court of appeal for Canada, or in virtue of its power to create courts for the better administration of the laws of Canada, which latter class might comprehend the B.N.A. Acts themselves and would seem to comprehend Acts of Parliament effecting general constitutional amendments.

(3) The force of Provincial Consents. A problem arises as to the power of the provincial legislature, having given consent, to withdraw it;[67] or, having refused consent, to give it. Neglecting this last as not being of particular difficulty, the first remains however more serious, and the latest formula makes no provision for it. Would the courts develop a contractual theory--offer and acceptance, with perhaps communication, constituting a binding consent, and precluding withdrawal? What rules would the courts develop as to the moment of the conclusion of the 'contract'?

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duty to reform or be reformed. Accordingly, Congress may still have an unrestricted power or recognition, whose exercise may however entail the consequence that the state authorities recognized may be liable to be reformed.

66. See Simpson v. A.-G. N.Z. [1955] N.Z.L.R. 271; ante, p. 321.

67. The problems of withdrawal or ratification and of time limits were taken up by Mr. Logan in the N.B. Legislative Assembly,

(4) The time for ratification. The latest Formula as drawn appears to presuppose action by Parliament of Canada followed by consent of the Provincial legislatures. If, once given, a consent cannot be withdrawn; or if, once given and answered with an acceptance of some sort a consent cannot be withdrawn, a consent would seem indefinitely good, with the result that consents given at widely varying times might be accumulated over a considerable period.[68] Could a provincial statute giving a consent fix a time limit? Could Parliament in its proposal do so? Would any period be implied if it did not? Could Parliament withdraw its proposal before any consents had been given? After one had been given but not "accepted"? After one had been given and "accepted"? Before a sufficient number had been given? Before a sufficient number had been given and accepted?

(5) The meaning of "provincial legislature". As it is likely that the provinces have, as we have seen, the power to complicate their legislative processes by referenda, special majorities, and so forth, either generally or for limited purposes, the impact of such experiments upon the general constitutional amendment processes established by the Formula or its successors--that is to say, processes requiring the participation of one or more provincial legislatures--would raise the greatest difficulties and the most serious problems. Even were we to adopt the American solution of an overriding power of ratification in the representative legislatures, there would remain the problem of special majorities, and so forth; our legal tradition would tend towards an insistence that the law on such matters be punctually respected.[69]

Synoptic Debates, 1965, I, p.383 (March 16, 1965). Mr. Hatfield at p.386 suggested: 'It would have been far better for the amending formula to provide that a resolution in the federal house should start the amending process. Then the necessary number of provinces could have enacted legislation regarding that resolution, and then the federal government would pass an Act changing the constitution...' His complaint was that as it stood the federal government 'loses control over whether or not that legislation will come into force'. See also Mr. Hatfield's doubts at

Under paragraph (1) above, we suggested that the Canadian legal order must be considered a single one, and drew appropriate conclusions as regards federal powers of 'recognizing' the public authorities of the provinces. This problem has another important aspect. Ought the laws of each province to be properly considered in every other province as matter of law rather than matter of fact? The present author's view is that they should, a view which draws some support from sections three and five of the B.N.A. Act which create one dominion and divide it into provinces, but a thesis which, radical as it may be thought, the author is not concerned to enlarge upon here. The particular relevance of this question lies in the fact that a "general" constitutional amendment would be part of the law of all provinces; all Courts would have to notice and apply it; and whether a purported amendment exists as part of the body of the law, is a question of law. This question of law would turn upon the law of the particular provinces whose consent would be in issue. It is impossible that this should be treated as a matter of fact determinable differently from province to province and from court to court.

(6) Comprehensiveness of the most 'difficult' procedure. The most general constitutional amendment power ought, in principal, to be capable of doing anything whatsoever, on the basis that the greater includes the less. One would assume, though by no means with complete certainty, that whatever could under the Formula be done by Parliament alone, or by Parliament and one or more legislatures, or by a legislature alone, could also be done by Parliament and all the legislatures conjointly. Otherwise, there can be no security in choosing, in cases of doubt, the most'difficult' procedure.

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p.387; inter alia: '...there is no time limit for determining whether any amendment becomes law or is rejected. The situation could become very fluid, with the nation unsettled on a particular constitutional matter for years on end, simply because, under certain provisions affecting the provinces, the individual province could endorse or reverse its position at will over an undetermined period of time. In other words, Mr. Speaker, no time limit in which provinces must ratify amendments is specified.' (p.399).

Such, in effect, was the view of the U.S. Supreme Court in the "National Prohibition Cases"[70] where the Eighteenth Amendment was unsuccessfully challenged inter alia on the grounds that it was legislation rather than constitutional amendment. One would think it clear, for instance, that the U.K. Parliament, which now retains by virtue of section 7(1) of the Statute of Westminster, 1931, unrestricted power to dispose of legislative power in Canada, ipso facto retains an unrestricted right to exercise that power.

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68. Ibid.

69. See Mr. Sherwood, N.B. Leg. Ass. Deb., Synoptic Reports, 1965 (March 16), I, 399: 'No provision in the proposals prevents a province from frustrating the process of amending the constitution by altering the majority of legislative members required for expressing its consent to any constitutional amendment, i.e., raising the requirements above a simple majority.'

    'Indeed, any of the 10 provinces could adopt such a procedure, thereby impeding future constitutional changes of vital national interest. Such action could place the whole nation in a constitutional strait jacket.'

70. (1920) 253 U.S. 350; 64 L. ed. 946; see ante, p.348 ff; and p. 355.

APPENDIX I

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

Judicial Committee of the Privy Council

Present: Lord Halsbury, L.C., Lord Hobhouse, Lord Macnaghten, Lord Davey, Sir Richard Couch. Jan. 27, 1899.

BETWEEN

THOMAS PELLEW STAPLES, Defendant ..... APPELLANT

AND

HER MAJESTY THE QUEEN ..... RESPONDENT

ON APPEAL FROM THE HIGH COURT OF MATABELELAND

The appellant was convicted of larceny by a judge and four assessors purporting to act under various Orders in Council for the government of Southern Rhodesia, a territory under the complete control of the Crown after the previous native sovereignty had been destroyed by force of arms. Petition for leave to appeal was made to the Queen in Council on the grounds that:

(i) the Orders in Council were void as made under the Foreign Jurisdiction Act when (so it was alleged) Southern Rhodesia was not foreign territory but part of Her Majesty's dominions;

(ii) on their true construction the Orders required (or continued existing law requiring) a jury trial in the case of the appellant, which he had been denied;

(iii) if the Orders did on their true construction purport to authorise trial without jury, they were pro tanto void as repugnant to statutes (especially Magna Charta) applying to the territory.

Held, by the Judicial Committee, in advising refusal of leave to appeal, that

(i) Southern Rhodesia remained foreign territory;
(ii) the Orders in Council authorised trial without jury;

(iii) the only Acts of Parliament to which Orders in Council must not be repugnant are those extending specifically to the territory.

PETITION for special leave to appeal from the decision and sentence of VINTCENT, J., in the HIGH COURT OF MATABELELAND, (December 9, 1898) whereby the appellant was convicted by the Judge, sitting with four assessors, of larceny, and sentenced to eighteen months imprisonment with hard labour.

The petition contained the following grounds of appeal:

'1. The place in which the said offence is alleged to have been committed and in which the said court heard and determined the said charge is not now and was not at the date of the said Matabeleland Order in Council 1894 or the said Southern Rhodesia Order in Council 1898 a foreign country or a country or place outside Her Majesty's dominions within the meaning of the Foreign Jurisdiction Act 1890.'

'2. The said place is situate in a British Dependency settled by British subjects who carried with them the Common and Statute law of the mother country applicable thereto, including the right of every British subject to be tried by a Jury of his peers.'

'3. The Order or Orders in Council under which the Court purported to act are void and of no effect.'

'4. The said Orders in Council are repugnant to the provisions of Magna Charta and to the provisions of 25 Edward 1 and other Statutes extending to Her Majesty's subjects in Matabeleland and to that extent are void.'

'5. The said Orders in Council prescribe that the law to be administered by the High Court of Matabeleland shall as near as circumstances permit be the same as the law in force in the Colony of the Cape of Good Hope at the commencement of the said Orders. The said law so in force in the said Colony prescribed trial by Jury in all criminal cases and the learned Judge was wrong in his construction of the said Order or Orders in Council.'

The proceedings in the High Court are fully reported in the Bulawayo Chronicle. This newspaper apparently comprised two portions, one printed on pink paper and one on white paper. The report is to be found in the edition of Saturday, December 10, 1898, at pages 3 and 5 pink, and 3 and 5 white, and Saturday, December 17, 1898, at page 4.

Before
MR. JUSTICE VINTCENT AND ASSESSORS (Messrs. H. Lamb, C.F. Bere, P. Browne and Mitchell). Monday, 5th December, 1898.

Thomas Staples, contractor, was charged with the theft of a quantity of articles the property of the Bechuanaland Railway Company. The evidence taken at the preliminary examination has been fully reported. Mr. Advocate Tredgold, with him Mr. Advocate Wright, appeared for the prosecution, and Mr. Advocate Ward, with him Mr. Advocate Russell (instructed by Messrs. Frames and Grimmer) defended; Mr. Advocate Turner watched the case on behalf of the Railway Company.

After the charge was read over and before the prisoner pleaded, Advocate Ward, on behalf of the prisoner and on behalf of the accused in the next case on the roll, said that there was an important matter which he wished to bring before the Court now, it being the right time to do so, he thought, before the prisoner had pleaded. The prisoner claimed the right, as a British subject, to his trial by a jury, which he claimed was the inherent right of every British subject conferred by the provisions of Magna Charta.

His Lordship called counsel's attention to the case of Salisbury Reefs v. B.S.A. Co., on appeal from the decision of Mr. Justice Watermeyer; the point of appeal being that the plaintiffs in the case had claimed that they were entitled to a jury. The Chief Justice, in giving the judgment of the Court of Appeal, said that so far as civil cases were concerned, there was no right to trial by jury, because at the time the Ordinance of 1894 was passed the circumstances of the country were found, as a fact by the Judge, not to admit thereof. That, of course, his Lordship continued, only referred to civil cases, but it had occurred to him that that judgment might be held by implication to refer to criminal cases as well.

Counsel pointed out that that case must be strictly confined to civil cases, and that there was nothing in the Chief Justice's judgment which in any way bore on the question he was now going to raise. Counsel then proceeded to argue that this was a country occupied by settlement and conquest, and that consequently the settlers brought with them the general body of law of their place of origin.

His Lordship said that so far as Matabeleland was concerned it was settled, in his opinion by conquest and not by settlement, although Mashonaland might be considered as coming within the latter mode of occupation.

Counsel said that although the country had no doubt been conquered, it was at the time of such conquest a barbaric country, and that therefore, according to the authorities, such conquest was tantamount to an occupation by settlement. It appeared to be clear, as was contended in the argument in the case of Stevenson v. British South Africa Company, that every British subject coming to such a country takes his own laws with him. Continuing counsel said that whether it was a country occupied by settlement or conquest, he contended that every British subject in such a country was entitled to his trial by jury, unless the Crown could show that he had been deprived of such right by an Act of the Imperial Parliament, and, at the very threshold of the case, he would challenge the Crown to show any such Act. It was perfectly well known that trial by a jury in criminal cases was the right of every British subject since the signing of Magna Charta, and the Sovereign could not without the sanction of Parliament derogate from the rights and liberties of the subject granted thereupon. Counsel then referred to Broom's Constitutional Law, p.57, on the subject of the Coronation Oath, in which that writer states that duties of the sovereign are set forth in that oath. Council read portion of the terms of the Oath, in which the sovereign swears to observe

the rights and liberties of the subject, which included trial by a man's peers, such rights and liberties being mostly contained in Magna Charta, Petition of Right, Habeas Corpus Act, Bill of Rights and Act of Settlement. These applied to every portion of Her Majesty's dominions, and the only way in which these rights could be derogated from, would be by the Imperial Parliament possibly in some cases or by a local Parliament assented to by the Queen. The right of trial by jury was given by Magna Charta.

Counsel here read the section of Magna Charta dealing with trial by a man's peers, and continuing said that unfortunately there had been no similar case before the Courts, where the right of trial by jury came into question. There were cases, however, where other rights and liabilities of the subjects had come into question. Counsel quoted the case of Bowman v. Middleton, referred to in argument in the case of Phillips v. Ayre [sic] (L.R. 6 Q.B. p.1). In the latter case it was held that the Legislature of a Colony could not commit one of its members for contempt. In the case of Bowman v. Middleton, a certain Act of a Colony was held invalid, 100 years after its enactment, as being contrary to the common right and to Magna Charta. Counsel then quoted from Broom's Constitutional Law, p.139 and 140, on the inability of the Crown to derogate from the rights of the subject, also the case of Doyle v. Faulkner [sic] (L.R. P.C. 328) as showing the limitations to the powers of parliaments appointed in the Colonies, that they had not the full powers of the Imperial Parliament of Great Britain. The latter, counsel said, was a case in which the Legislative Assembly of Dominica had imprisoned a member for contempt of the House; the case came before the Judicial Committee of the Privy Council, by whom it was held that the Assembly had no right of imprisoning for contempt as in the case of the Imperial Parliament it being a derogation from the liberties of the subject and not to be considered as imparted by custom. The main principle laid down was that before a colonial parliament could pass any Act derogating from the liberty of the subject, it must be shown most clearly to refer to some power granted by the Parliament of Great Britain and mentioned in specific terms. This requirement of specific mention was again clearly laid down in the case of Levinger v. Regina (L.R. 3 P.C. 282); in that case a prisoner in the colony of Victoria demanded a jury, and when a jury was empannelled, challenged one of the jury, his right to do which was refused on the ground that the Colonial Act which appointed a jury gave the prisoner no right to challenge. The case came before the Privy Council on leave to appeal, and it was held that the right to challenge was given by the fundamental laws of England, and this right of challenge applied always except where expressly taken away. In his judgment Sir Joseph Napier said the question was whether the right of peremptory challenge had been taken away by the statute; such right was, however, not to be deprived by implication, it could only be specially taken away by statute. In the case of every Legislature or Parliament of a colony, when it passes an Act, one must look to the Ordinance constituting such Parliament. Counsel then referred to Stephen's "Commentaries on the Laws of England", where Blackstone's description is given of trial per patriam, i.e., trial by jury: "The grand bulwark of liberties," and continuing, said that reference to the authorities he had quoted made it perfectly clear that there was that right inherent in every British subject. Although there were no cases in England exactly on the point, there were cases where the Crown had endeavoured to interfere with the rights of jurors, such as fining or prosecuting them for perjury, for giving verdicts not in accordance with the evidence or against the direction of the judge, etc. It was held in all such cases that the Crown had no right to punish jurors, as any such power would mean the destruction of the rights of the subject. The leading case on this subject, "Bushell's case", was mentioned in Broom's Constitutional Law, p.115, it being there laid down that a juror could not be fined for returning a verdict against the weight of evidence or against the direction of the judge.

Counsel then quoted Broom's remarks on that case at page 148, and, continuing, said that the present case therefore resolved itself into this, that even supposing that under the constitution of this country there was a distinct statement providing that there should be no right of trial by jury in this country, then he submitted that that provision, if any, was contrary to law, and could not be upheld, because the Queen herself had no right to do that.

In reply to the Court, counsel said that the Queen derived her powers as regarded this country under the Foreign Jurisdiction Act, 1890, and he found nothing in that Act empowering the Queen to take away the right of trial by jury. In that statute it was laid down that the powers to be exercised by Her Majesty in countries outside her dominions in regard to British subjects, should be the same as within her dominions. The Act, moreover, conferred the power of sending persons charged with crime, for trial to a British possession, i.e., whenever a crime occurred in a foreign country, the Crown had the power of sending the accused person to a colony where a trial could be obtained. Therefore, he submitted, that in cases where a magistrate was in charge and no jury was obtainable, he had the power of sending the accused to a colony where a jury could be obtained.

His Lordship asked were they obliged to do so.

Counsel said at any rate it gave the power of doing so. Counsel referred to the Act 26 & 27 Vic. cap. 25, "an Act for the prevention and punishment of Her Majesty's subjects in South Africa," (which had been repeated by the Foreign Jurisdiction Act, 1890).

Counsel said that there was nothing in the Foreign Jurisdiction Act giving power to the Queen to deprive a subject of the right to trial by jury. He would admit that in a new country trial by jury in civil cases could not well be applied; one would have to wait till there were sufficient people able to come forward and put aside their own business in order to adjust private quarrels, so to speak, but in criminal cases it was a different matter. Taking for instance the cases of the Eastern Province and Griqualand West; there they were not ripe for trial by jury in civil cases for a long time, but the right of trial by jury in criminal cases was exercised in Griqualand West 20 years before that in civil cases.

His Lordship said that was brought in by statute.

Counsel said that the statute merely provided the machinery by which juries were to be called, and therefore the fact of the statute was no argument against the right to trial by jury; other Acts were subsequently passed dealing with the summoning of witnesses, of jurors, etc., and all those Acts simply provided the machinery for the obtaining of the jurors. Now, in 1828, juries were granted to the Cape Colony, although at that time it was thinly populated and the inhabitants were scattered at great distances and had to travel at great distances to serve as jurors. He submitted that it was idle to contend that in this country there were not as great facilities now as there were in Cape Colony in 1828.

His Lordship said the question was not so much what the circumstances were now as what they were at the time that law was supposed to come into force.

Counsel agreed; if, however, he added, their right to trial by jury depended on whether the Queen in Council gave them that right, and that was part of the body of the Colonial law put into force here, there would be considerable force in the argument, that at the time the Ordinance came into force the right to trial by jury existed, and that therefore it could not be

taken away except by a special Act. But the point to be taken for the Crown was this, that they must show that the Queen had power to deprive subjects of the right to trial by jury, and they must show specific words in that Ordinance where that had been done. The words, "So far as the circumstances of the country permit" were not specific enough. According to that argument, the right to trial by jury would be in force in this country in 1899, as the new Ordinance came into operation in that year, and enacted that the laws in force in the Cape Colony up to 1891 should be applicable in this country so far as the circumstances of the country would permit. Continuing, counsel said he drew a distinction between civil and criminal cases. In the first case it was a question whether people were liable to be called on to decide private quarrels; but in the later case the question was, could the Crown call nine persons together?

His Lordship said 27 were necessary.

Counsel said that if nine could be called together, then the question of calling 27 was a mere matter of machinery. In reply to his Lordship, counsel said that he only argued that proceedings against a subject without a jury were ultra vires if the subject did not [sic] object; it could be contended that if a prisoner did not demand a jury the Crown were within their rights in trying him without one.

His Lordship asked whether counsel had seen sec. 31 of the Matabeleland Order in Council of 1894, where it was provided that the High Court should be held at such times and places, etc., and that the jurisdiction of the High Court might be exercised by any judge sitting alone.

Counsel said that applied only to civil jurisdiction, and meant that although two judges were appointed, one should constitute a Court. The Colonial statutes were introduced into this country; three judges of the Supreme Court were by those statutes appointed for the Cape Colony, and not less than two were to sit as a Court, and it had therefore to be laid down in the Ordinance that the jurisdiction of the Court in this country could be exercised by one judge sitting alone. A jury was no portion of a Court, it had simply to listen to the evidence, it delivered no judgment. The judgment was the judgment of the Court, and therefore the section referred to by his Lordship, did not apply. If that section was to deprive them of trial by jury, it must be specified in the clearest manner possible. The assessors delivered no judgment, they were simply there to assist the judge, and they were especially necessary for that purpose in countries where natives had to be tried and native customs taken into account, as in this country, and they were in no sense jurors. Counsel then referred to the case of Sigcau v. Regina (Shiels Supreme Court), where the Chief Justice held that the Governor had no power to assent to a statute of the parliament of the Cape Colony, which was contrary to the liberty of the subject.

His Lordship said that the point was that the Governor had no power to issue a proclamation of that nature.

Counsel said that the case went further in his judgment. The Chief Justice went on to say "If this were an Act of Parliament and the Governor had assented himself, he had no power to assent." In that case, therefore, it was held that one cannot deprive the subject of his right to trial, and they (the defence) went further and said that one could not deprive him of trial by jury. Counsel then referred to the Matabeleland Order in Council 1894, that in the latter there was the special clause which empowered the Court to send prisoners for their trial to a British colony, and if he claimed trial by jury, then he could easily be sent to a colony where there was trial by jury. Having regard to the fact that in the event of the case

going before the Privy Council, with all due deference to his Lordship's decision in the matter--as it was a matter of the utmost importance to the subjects of this country--would his Lordship admit in the roll any evidence as to the present circumstances of the country, e.g. statements as to the number of inhabitants, of municipalities, etc.?

His Lordship said he would take judicial notice thereof.

Advocate Tredgold then addressed the Court for the Crown.

He said that his learned friend had in his arguments escaped the real ground for argument, i.e., the power of the Crown in Council to legislate for the Crown colonies. If that power were not inherent in the Crown in Council, how was it that all the Crown colonies had obtained their statutes? In the case of Philip v. Ayres [sic] it was clear that full and plenary powers of legislation (including those with regard to the liberty of the subject) were given by the Order in Council.

Advocate Ward: By Act of Parliament.

Counsel said his friend said "by Act of Parliament"; but it was not by Act of Parliament alone, e.g., by Letter Patent.

In reply to his Lordship, counsel said that it was perfectly clear that the Queen legislated for this country by virtue of the Foreign Jurisdiction Act. Continuing, he said that according to his friend, the question whether the number of jurors was to be nine was absolutely of no effect, as the number of jurors, whether nine or twelve or any other number was, as a matter of principle, nothing. With regard to the Assessors, it was perfectly clear they were part of the Court; they were there to consider questions of fact, and without them the Court could not proceed. The principle of juries was a growth of statute; it was put on to the Common Law by statute. The juries called before Magna Charta were very different to the juries called after Magna Charta. They were really witnesses, and it was therefore not a fundamental principle. The real fundamental principle was that every man should have a fair trial in view of all men, etc., and provided that a fair trial was given no further principle was involved. In the case of Doyle v. Faulkner [sic] the ground of the decision was simply that a custom of the British Parliament could not be held to have been imported with the general law of the country. The case of Levinger v. Regina simply followed the well-known principle that in case of doubt a prisoner should have the benefit of it. In that Colonial statute there was a doubt whether or not the prisoner was to have the right of peremptory challenge. All those points could be taken away, and if his friend was correct in his opinion, they had a most extraordinary anomaly in this country--prisoners submitting to be tried by magistrates without a jury. The High Commissioner had declared that the laws of the Cape Colony, in force on the 10th June, 1891, should be the laws of this country, so far as circumstances would permit, and in deciding on what those circumstances were, they should look to the whole of Rhodesia, and not to Bulawayo alone; one could not have trial by jury in Bulawayo and a different system elsewhere.

Advocate Ward in reply, said that with regard to his friend's contention that the Queen in Council had full powers, his friend had referred to no authorities on the subject. It was laid down in all the books on constitutional law, that the Queen had not those full powers, and in her coronation oath, Her Majesty swears that she will govern the dominions of the Crown in accordance with the laws of the country. The terms of the oath were that she "will govern the people of this kingdom and the dominions thereto belonging, according to the states in Parliament and according to the laws and customs of the same." The statutes which were referred to in the Coronation

Oath were Magna Charta, the Petition of Right, Habeas Corpus Act and Bill of Rights and the Act of Settlement. Where did his friend find that the Queen had the right to provide for trial without a jury? The colonial legislatures of Canada, Australia, and India were appointed under various Acts of Parliament passed by the Imperial Government. They did not reserve plenary powers to the Queen, and those colonial parliaments sat there as the representatives of the people and the powers which they enjoyed were the powers which the people of Great Britain had allowed the Queen to delegate to them.

His Lordship pointed out that in very many places like China, Japan, etc., there were consular courts established.

Counsel said that in some there were juries.

His Lordship said that in some there were none; the Queen had the power of appointing these consular courts where persons were tried by a consul without a jury.

Counsel said that if one of those persons at any time demanded a trial by jury, the consul would have no power to try him. Further, with regard to the trial of small offences before Magistrates, it was provided in England that every person tried in a Magistrate's Court for felony had the right to demand trial by jury. In conclusion, counsel repeated that if an Act were passed intending to give the power of trying persons without a jury, it must state such intention in specific terms. His friend said that they were only depending on Magna Charta, and implied what was Magna Charta? He would read from Hallam's "Middle Ages" on that point.

Counsel then read an extract from that work, in which Magna Charta is referred to as a treaty between King and subjects. With regard to his friend's contention that Assessors were necessarily a part of the Court, since the Court could not go on without them, counsel pointed out that the same argument applied to prisoners and witnesses. Concluding, counsel again asked the Crown to point out any passage anywhere giving the Queen the power claimed by them.

His Lordship said that having learned that further proceedings might be taken, it would be just as well for him to consider before giving judgment; he hoped to give judgment tomorrow morning.

TUESDAY, 6th DECEMBER, 1898.

His Lordship said that since Mr. Advocate Ward's very able argument yesterday he had gone carefully through the Foreign Jurisdiction Act. He understood one of the points raised to be this, that the Queen had no right to go beyond the terms of Magna Charta unless she were specially authorised to do so by statute of the Imperial Parliament. In reading the Foreign Jurisdiction Act he noticed that the Queen was given very wide powers as to legislation over her subjects in foreign territories or protectorates. His Lordship then read sections 12 and 2, the latter of which provided that "Any Order in Council made in pursuance of this Act shall not be deemed to be void on account of repugnancy to the law of England, unless it is repugnant to the provisions of some special Act in force". It seemed to be contemplated there that the Queen could by Order in Council legislate and bring into force legislation which was repugnant to Magna Charta, unless the actual terms of the Order in Council were repugnant to the provisions of any particular Act or that particular Act.

Advocate Ward said that he would submit that "the laws of England" meant the general body of English law, i.e., the sort

of laws which were imposed upon a country taken over by conquest apart from the rights of the subject, which were a correlative to the duty the subject owed to the Sovereign; the subject owed allegiance and loyalty to the Sovereign, and these had a correlative right, viz., the rights of liberty.

His Lordship said that the section he had last quoted gave the Crown power to legislate in those protectorates and districts to bring into force legislation that might be repugnant to the law of England.

Advocate Ward said he would submit with all due deference that it did not apply in this case, for the reason that it had been held by some that the Sovereign had merely the power of changing the laws of a conquered country, apart from the Imperial Parliament; he submitted that that section gave no greater power than was contended by those authorities. That law was to be read subject to this, that the Queen could not derogate from the rights of the subject or depart from fundamental principles.

His point was this, that the Queen could do no wrong, and it would be a wrong, for instance, were the land of a subject to be expropriated; therefore the Court, in considering any section of an ordinance passed by the Queen, would consider whether that section was doing a wrong to the subject.

His Lordship said that it seemed to be contemplated by the Act, it seemed to be recognised, that where the Queen had jurisdiction over territories or protectorates, that the Queen in the exercise of her jurisdiction under the Act, could bring into force legislation which might be repugnant to the laws of England, where the circumstances of the country were not such as to permit of the introduction of all the customs, rules, and laws of England, or of more civilised places.

Advocate Ward pointed out that that express provision in the Act and in the Act repealed thereby, referred to a portion of South Africa below the 25th degree, and that by it prisoners could be removed for trial to a British colony; he would submit that where a prisoner demanded a trial by jury he would have to be removed, as it was to be presumed that the Queen, and the magistrate as her representative, would do right.

His Lordship said that no right was given by the Act to a prisoner to demand his removal; it was in the Court's discretion.

Counsel said that it would be difficult to say what case could be contemplated by those words unless it were the case where a prisoner demanded some right which could not be given him by the machinery of the country where he then was.

His Lordship suggested that it might be a case where it would be advisable to have him tried in some other country, on account of witnesses.

Counsel said it would be difficult to imagine the case of a crime committed within the jurisdiction of a magistrate, where the witnesses were in another country.

His Lordship pointed out that certain machinery had been put into force in Bechuanaland, which excluded trial by jury. Under what power, he asked, had that been done?

Counsel said that he could not say; he knew that machinery was often put into force without any power, which existed until attacked.

His Lordship asked whether the Queen had not power, in the case of new territories, by Order in Council or Letters Patent, to lay down what rules and laws should be recognized in those

territories.

Counsel said yes, provided that she did not depart from fundamental principles.

His Lordship said that counsel then contended that all those proclamations and laws which had been put into force in Bechuanaland were invalid and ultra vires.

Counsel said yes, so far as they were contrary to fundamental principles. Such an Ordinance could stand until show to be ultra vires, and any prisoner tried there who claimed a jury would have been entitled thereto.

His Lordship said that legislation in Bechuanaland had been put into force under the Queen's commission. Counsel had said that the Queen had the right to provide by Letters Patent for legislation generally. She had an inherent right. For instance, his Lordship continued, she could tax; she had the power by Letters Patent to delegate the power of legislating to the High Commissioner or Governor.

Counsel said that the Governor, although such powers were delegated to him, could not do all the acts of the sovereign, although he was the latter's representative.

His Lordship said that another point was this: he did not know whether due reference had been made to the provisions of the new Order in Council. What did counsel say was its effect on the case, having regard to the fact that a High Court of Southern Rhodesia was thereby constituted to administer certain laws, without any power of jurisdiction until the High Commissioner should notify the opening of such Court?

Counsel said that he submitted that under the new Order in Council, the laws to be administered by the High Court of Southern Rhodesia should be the laws of the Cape Colony in force on the 10th June, 1891, so far as the circumstances of the country would permit. These circumstances were the circumstances of 1899, and therefore in the Court which was constituted in 1899, under exactly the same terms as the present Court, there was the right of trial by jury, as the present circumstances permitted of it, whereas when constituted in 1894, there was no such power. The Act, in order to deprive of such a right, must do so by words clear and conclusive.

His Lordship asked what was the effect of section 49 and the following sections in part IV, dealing with "Judicial". His Lordship read section 49. "There shall be a Court of record styled the High Court of Southern Rhodesia, with full jurisdiction, civil and criminal, etc." "The law to be administered by the High Court shall be the law in force in Cape Colony on the 10th June, 1891." Continuing, his Lordship said he was not the High Court of Southern Rhodesia, he was still the High Court of Matabeleland. Now in deciding whether certain Acts of the Colony were applicable to the circumstances of this country, must the Court take the present circumstances or those in force in 1894?

Counsel said that in deciding under the new Ordinance, the Court must take the circumstances when the Ordinance was passed.

His Lordship having read the sections of the Order in Council, to which he was referring counsel, the latter said that he would contend that his Lordship was sitting as a sort of interim court, it was a kind of interregnum, so to speak, because even though the High Court of Matabeleland were bound by that Order, the Order under which his Lordship's Court was constituted was no longer in force. Therefore his contention was that the law which the Court had to administer now was the law laid down in that new Order, although the new court had not

yet come into existence. Counsel read section 78 of the new Order in Council: "The High Commissioner shall notify by public proclamation the time when the Courts hereby established will be opened, etc.;" also section 91. "The Matabeleland Order in Council 1894 shall continue in force until the commencement of this Order and shall thereupon be revoked, but without prejudice to anything lawfully done thereunder." That favoured his contention, counsel continued, that the Matabeleland Order in Council was no longer in force, and the law now to be administered was that under the new Order in Council; that therefore the circumstances of the present time were to be considered, and it could not be denied that those circumstances were different to what they were in 1894.

At his Lordship's suggestion, the Court adjourned for a few minutes to allow the defence to consider the point raised by his Lordship, and on the Court sitting again, Advocate Ward said that it was quite clear from section 91 that the Matabeleland Order in Council had been revoked, and therefore, unless his Lordship had to administer the law as laid down in the new Order, it would appear that his Lordship had no law to administer. (Laughter).

Further, if the law to be administered was as he contended, then the circumstances of the country to be regarded must be those in force at the date the Order came into force. That seemed to be laid down by the Chief Justice in a passage in his judgment in the case of Cooper v. Stewart (14, Appeal Cases 286 at page 292.) Counsel then read the passage referred to, and,continuing, said that it was contended by jurists that when a new country started with a few laws, as the circumstances of the country grew, so the law grew.

His Lordship said that it would appear from the effect of the judgment that even although the circumstances of the country after the time that the law was brought into Matabeleland might have been such as to warrant trial by jury, yet in deciding that question one had not to look at those circumstances, but at those in force at the time when the law was brought into force. His Lordship then dealt with the present circumstances of the country, and expressed a doubt whether they were so advanced as to warrant the applicability of trial by jury, and instanced the case of Victoria and even Gwelo.

Counsel contended that these places were sufficiently populous and pointed to many of the small and isolated towns in Cape Colony, and pointed out that persons were brought for trial from Prieska to Victoria West, 4 or 5 days' journey, from Kuruman to Vryburg, etc., and concluded by saying that the circumstances of this country were not more opposed to trial by jury than in Bechuanaland, Griqualand West, or Namqualand, and that therefore the circumstances of the country were certainly such as to warrant trial by jury.

Advocate Tredgold contended with regard to the Foreign Jurisdiction Act, that the "repugnancy" referred to in section 2 was not to be considered with regard to any English law, but to the law of the country for which those proclamations were made. There was nothing in an ordinance, providing for trial without a jury, repugnant to the fundamental principles of Cape Colony law or Roman-Dutch law, since by these a man could be so tried, and the section therefore clearly covered the ground which the new Ordinance intended to cover. On that point, therefore, there was no repugnancy with regard to the Colonial law, and it was perfectly within Her Majesty's powers. With regard to the new Ordinance, he thought the difficulty might be cleared up in this manner: the Ordinance contemplated the creation of a new Court; now, what was the law to be applied by that Court? It was the Cape Colony law in force on the 10th June, 1891, insofar as not inapplicable,

but the Court could only decide on any inapplicability of that law when such Court was created. The Proclamation of 1891 had never been repealed, and the 22nd section thereof stated what law was applicable then, and his Lordship was therefore not sitting as a court with no power, as, very peculiarly, the Matabeleland Order in Council had been repealed but not the Mashonaland Order in Council. It was the Court of Southern Rhodesia which was to apply the new law when it came into existence, and then the Ordinance of 1894 would be no longer in force.

His Lordship: It is already repealed.

Continuing, With regard to Cooper v. Stewart, it was clearly stated there that the power of remodelling the law belonged to the Colonial Legislature. With regard to the circumstances of the country, counsel pointed out that it took 200 years before trial by jury was introduced into the Colony, and contended that the circumstances in force here were not ripe for such procedure.

After Advocate Ward had replied,

His Lordship said that after the adjournment yesterday afternoon, he had consulted with his brother Watermeyer, who had had the advantage of being in Court and listening to the able argument for the defence. He might say that the conclusion they had both arrived at was that the contention of Mr. Ward could not be upheld, but since that consultation it had occurred to him that something might be argued (for the defence) with regard to the operation of the new Order in Council, and also with regard to the operation of section 12 of the Foreign Jurisdiction Act. He therefore had requested further argument on that new point, and he must confess that he experienced considerable difficulty in that case, because it appeared to him that if he had to decide the matter in accordance with the circumstances of the country in force in 1894, he would say that they were not at that time fit for trial by jury. But the doubt he felt was as to the operation of that new Order in Council, by which a different complexion might be put on the case. If the circumstances of the country at the present moment had to be taken into consideration, it could not be denied that between 1894 and 1898, they had altered. He did not feel in a position to give judgment that morning on that question which was a far-reaching one and he would like further time to consider that new point. Had it not been for the provision of the new Order in Council he would have no hesitation in holding that the circumstances of the country--being those in force in 1894--were not such as to bring the Colonial laws as to trial by jury into force here. He would also have held that in this case the rights under Magna Charta had not been derogated from, and that the Queen under the Foreign Jurisdiction Act, had full power to legislate in foreign territories and protectorates, and to legislate in the manner in which she had done so here. Although such legislation was repugnant to the common law of England, it was only reasonable that such should be the case. One could well imagine the circumstances in force in some new protectorate, where it was impossible to have trial by jury, and where it would be almost impossible to remove a prisoner to a far-distant colony where he could obtain trial by jury. He would then have held that such an Order in Council, which did not contain an express provision that there should not be trial by jury, would not be ultra vires. His Lordship then referred to the consular courts where trials without juries are held, and continuing, said that although a further adjournment might cause some inconvenience to counsel and witnesses, it was only fair to the prisoner himself, on whose behalf the objection had been raised, to take time to consider the new question which had arisen. He would give his decision, however, very shortly.

The Court then adjourned.

FRIDAY, 9th DECEMBER. The decision of Mr. Justice Vintcent (reported in the Chronicle for December 17, pink page 4,) was given. Evidence being taken, the accused was found guilty and sentenced to imprisonment for eighteen months, with hard labour.

VINTCENT, J. The presence of the Assessors sitting here may be taken as an indication of what my views are in this case. I had to a certain extent expressed an opinion on the case on the conclusion of the argument last Tuesday, and I desired to take time to consider the effect of the new Order in Council.--if it had any effect on this case. Counsel for the prisoner has demanded a trial by jury, on the ground that, according to the provisions of Magna Charta, it is the inherent right of every British subject in a British territory or possession to claim such, independently, broadly speaking, of any legislation which may exist in such possession with respect to trials, excepting the legislature if such territory has acquired special powers to ordain trials without a jury. He stated that Rhodesia--which at that time consisted of Mashonaland--was occupied by British settlers and that they brought with them the laws of England, and that [trial by jury was] included in those laws which were based on the provisions of Magna Charta, and that if any legislation has occurred since which is at variance with any of those provisions such legislation is ultra vires of the powers vested in the Queen. Furthermore, that even if such legislation be not ultra vires, it really points to trial by jury, inasmuch as the Cape laws were brought into force, so far as the circumstances of the country admitted, and that those circumstances were such as to warrant trial by jury. Now I propose to go very shortly into the history of this country and then deal with the points raised by counsel.

It is well known that the British South Africa Company acquired a Charter on the 29th October, 1889, and that in accordance with that Charter an expedition was formed for the purpose of settling Mashonaland. That expedition started from the Colony and whether it was exclusively composed of British subjects or not, is unnecessary for me to determine. They duly occupied Mashonaland. Let us assume, for the sake of argument, that these settlers were all British subjects and that the argument of counsel is right, namely, that when they came into the country they brought with them the provisions of Magna Charta which were in force in Mashonaland. Now, the Foreign Jurisdiction Act was passed in 1890 and that Act gave the Queen very large powers with regard to legislation generally, and the establishment of courts and the determination of their jurisdiction, in foreign countries where she may have obtained certain jurisdiction, and in protectorates. By Order in Council, dated the 9th May, 1891, the Queen delegated a portion of her powers to the High Commissioner of South Africa, and the latter on the 10th June, 1891, brought out a Proclamation by which he provided for the establishment of Courts of Justice and also for the levying of taxes (to a certain extent) and other matters. He established [that] by Proclamation Magistrates' Courts, Resident Commissioners' and Assistant Commissioners' Courts, and also brought into force the Cape laws which were in force there on 10th June, 1891, insofar as they were applicable. With regard to the trial of criminal cases, the Resident Commissioner by that Proclamation was to have sole jurisdiction without a jury, but he could, if he liked, call in four assessors; the same powers were vested in Magistrates or Assistant Commissioners, but their powers were limited. This was continued until 1894, and it is a well-known fact that in Mashonaland the term "Resident Commissioner" was changed to that of "Chief Magistrate", the latter to have all those powers mentioned, and for three or four years he exercised sole jurisdiction over civil and criminal matters, the right being reserved to him of calling in assessors.

Several instances occurred in which the Chief Magistrate tried serious criminal cases without a jury--for instance in those murder cases, where his judgment was confirmed by the High Commissioner, and the execution of the accused took place on such judgment. Now we come to the Matabeleland Order in Council, when a different state of affairs was put into force, the High Court of Matabeleland being established, and that Court being given full jurisdiction over all civil and criminal matters. By section 31 of that Order it is provided that the Court shall be held at such times and places as the High Commissioner may determine by Proclamation and pending other arrangements, the jurisdiction of the Court shall be exercised by one judge sitting alone. No special provision for trial by jury was made in the Matabeleland Order in Council, and since that Order in Council, many cases have been tried by a judge of the High Court sitting alone, assisted by four assessors, the assistance of the latter being taken by virtue of the powers vested in the judge by the Proclamation issued in July, 1895. In that connection I candidly state that when I first took my seat on the bench, I carefully perused the provisions of the Matabeleland Order in Council, and the conclusion I arrived at was that under section 31 thereof, I was given powers to sit by myself to try all criminal cases, and I still hold that opinion. It was through my instrumentality that the Proclamation of July, 1895, was brought into force, because I felt that there were many criminal cases in which too great a responsibility was thrown on the judge sitting alone, a great deal of which might be removed if he were assisted in that manner; the Proclamation was duly passed. That was my opinion at the time and it has always been my opinion.

Now let me deal with the question of Magna Charta. On that point I say that even assuming that Magna Charta may be considered to have been applicable to the settlers when they came here, I consider that the passing of the Matabeleland Order in Council and the Proclamation of the 10th June, 1891--by which the law to be put into force was the law of the Colony in force on the 10th June, 1891--had entirely done away with whatever effect Magna Charta might have had. The Cape laws were thereby put into force, so far as the circumstances of the country would admit, and it was ordained that the common law of the Colony as well as the statute law in force up to the 10th June, 1891, insofar as the same were not inapplicable to the circumstances of the country, should be the law in force in this territory. So far as I have been able to ascertain, there is no provision under our common law for trial by jury. So far as the Cape Colony was concerned, it was the creation of Colonial statute and not an inherent right of the old Dutch settlers, i.e., it was not an inherent right in Holland. In the Cape Colony, therefore, for many years trials of criminals took place by a judge without a jury. It has been urged that the Queen has no right to issue an Order in Council in any way opposed to the provisions of Magna Charta, unless it can be shown that the English Parliament has given her express power to legislate in opposition to those provisions. The Queen, as I have said before, has full power of legislating in those territories by Order in Council, and she takes these powers from the Foreign Jurisdiction Act, 1890.

His Lordship then read section 1 of the Act, and, continuing, said:

Now, I do not think that it can be denied that the Queen has the power, when a new country is annexed or conquered, to legislate by Letters Patent or Order in Council for that territory in any way she may think fit. And in the course of the argument I instanced the case of Bechuanaland, which was annexed to the Crown in 1884, where the Queen by Letter Patent gave the Governor full powers to legislate, in the manner I mentioned on Tuesday--to establish Courts of Justice, in which

no provision was made for trial by jury. The Queen, I think, therefore has full power in such cases, to legislate in whatever manner she may think fit. Section 12 ss 2 of the same Act, provides: "Any Order in Council, made in pursuance of this Act shall not be, or be deemed to have been, void on the ground of repugnancy to the law of England." Assuming, therefore, that this Matabeleland Order in Council had ordained that there should be no trial by jury, it is perfectly clear to my mind that the Order being made under the provisions of the Act, the Queen has full powers to legislate in this manner, although such legislation may be repugnant to the laws of England and Magna Charta. And, as I have stated in the course of the argument, it is only reasonable that the Queen should have such powers when one takes into account the circumstances of many countries where she has jurisdiction, where it is impossible to carry out all the laws and rights appertaining to British subjects in the British Isles. So that if the Matabeleland Order in Council in set terms did take away the right of trial by jury, it would be perfectly right; by this sec. 12, sub-sec. 2, it is perfectly clear that the Queen may legislate in whatever manner she may think fit, although such legislation be repugnant to the laws of England. That, I think, exposes the fallacy which underlies the argument of Mr. Ward, which is practically based on the provisions of Magna Charta.

Now we come to the question of the Matabeleland Order in Council, 1894. The provisions of this Order were to a certain extent discussed before my brother Watermeyer in a civil case heard before him at the last sittings in September or October in the case of Salisbury Reefs Gold Mining Co. v. B.S.A. Co. In that case the plaintiffs applied for a trial by jury and applied to the judge with a view to having the issue settled. This application was opposed by the British South Africa Company, and the conclusion at which the learned judge arrived was that no trial by jury, in civil cases at any rate, existed in this country. As this decision was upheld on appeal by the Court of Appeal of the Supreme Court of the Cape Colony, I propose to read a few extracts from the judgment of Mr. Justice Watermeyer, as well as from that of the Chief Justice of the Supreme Court. Mr. Justice Watermeyer said: "The next difficulty is, where is the jury to be obtained from? I pass over Mr. Castens' objection that there are not sufficient jurymen in town. I think that the requisite number could be found, but certainly the choice would be limited and with the present population it is probable that the same men would be summoned to every jury sitting." Then he says: "But since the establishment of this Court in 1894, there never has been trial by jury in a criminal case. I do not know if the matter has been argued, but certainly it seems to have been heretofore assumed that the right of trial by jury in criminal cases did not exist. The Court has always acted on this assumption. I presume that it was the result of the interpretation placed on section 31 of the Order in Council."

His Lordship then read sections 26 and 31, which provide for the establishment of the High Court of Matabeleland, with full jurisdiction in civil and criminal matters, and for the exercise of that jurisdiction "by any judge thereof sitting alone", and referring thereto said:

So that full jurisdiction is given to the High Court in civil and criminal cases, and by section 31, it is provided that jurisdiction shall be exercised, until other arrangements are made, by a judge sitting alone. Mr. Justice Watermeyer then goes on: "The practice has been recognised by legislation providing for assessors in criminal cases--see High Commissioner's Proclamation of July 23rd, 1895." Now I hold that even in spite of the provisions of the present Order in Council, that the Proclamation of the High Commissioner is still in force so far

as Matabeleland is concerned. The judgment continues: "The Proclamation seems to me quite inconsistent with a right of trial by jury in criminal cases. In my opinion the right of trial by jury in criminal cases, if it ever existed in this country, has, if not actually repealed by the above-mentioned Proclamation of July, 1895, been tacitly repealed." He then refers to the case of Seaville v. Colley. Then he goes on to say: "But I am prepared to go further than this, and to hold the sec. 31 of the Matabeleland Order in Council was intended to exclude juries until other arrangements are made by Proclamation. The language used is not as clear as it might be, but I am satisfied that was the intention of the section, and certainly that interpretation must have been put upon it when the Proclamation of July, 1895, above referred to , was issued."

Mr. Justice Watermeyer is therefore of opinion that no right of trial by jury exists in civil cases; that such right is not in accordance with the terms of section 31, which clearly points to the fact that it was recognised that no trial by jury was put into force, and that a judge has full jurisdiction to try criminal cases sitting alone, and that that view is borne out by the provisions of the High Commissioner's Proclamation of 1895. Then we have the judgment of the Chief Justice, who uses these words:--"The fact that there never has been, in the Orders in Council, any provision made for a jury in either civil or criminal cases goes far to show that it was considered that the circumstances of the country did never permit of trial by jury." In the Matabeleland Order in Council of 1894 it is clear that no specific provision is made for trial by jury in criminal cases, although it is true that it put into force the Cape law at the 10th June, 1891, so far as applicable to the circumstances of the country; but at any rate there is this decision that at the time the Order came into force, those circumstances were not such as to warrant trial by jury, either in civil or in criminal cases. But I go further and say this, that the Matabeleland Order in Council clearly shows that it was contemplated that trials in criminal cases should take place before a judge sitting alone, and that he could, in accordance with the Proclamation of 1895, call in four assessors to assist him. Now, has any different complexion been put on this Order, by the provisions of the new Order in Council?

Argument has taken place on the effect of this new Order, insofar as it was necessary to determine what particular law, I, sitting as this Court, had to administer. The conclusion I have arrived at is this, that as that Order in Council has been passed, I must administer the laws which are mentioned therein (i.e., the laws laid down in section 49 of the Southern Rhodesia Order in Council), and that, if it became necessary, I would have to consider, in applying the Cape laws what were the circumstances of the country at the time that Order in Council came out. I find that under the Southern Rhodesia Order in Council the powers which are vested in the Court of Southern Rhodesia are similar to those vested in the High Court of Matabeleland by the Matabeleland Order in Council of 1894. I find that section 54 of the new Order in Council is almost in the same terms as section 31 of the old Matabeleland Order in Council, which had been repealed thereby.

His Lordship read the section, and continued:

Therefore, holding the views that I do with regard to the interpretation to be placed on section 31 of the Matabeleland Order in Council, and finding that the provisions of section 54 of the new Order are the same as those of section 31 of the old Order, and holding that section 31 empowers the Court to sit alone for the trial of criminal cases without a jury, I am bound to come to the conclusion that if I were sitting as a judge of the new Court of Southern Rhodesia, I could try all criminal cases by myself without a jury. And I would say this, that if it were necessary for me to determine as to whether the

Cape laws applicable to juries in criminal cases were applicable to these territories, I must confess I would have considerable difficulty in arriving at the conclusion that they were so throughout these territories, when I find the Judge sitting at Salisbury only two months ago coming to the conclusion that so far as the town of Salisbury is concerned there would be great difficulty experienced in getting a jury for the trial of civil cases, and that the same jury of seven would have to sit throughout the term.

Taking into consideration the circumstances of places like Victoria and Gwelo, for instance, I would hesitate before arriving at the conclusion that the circumstances of the country were such as to entitle it to the application of the Cape law as to juries. But, with the view I hold in this case, it is unnecessary for me to determine the point, holding the opinion I do, that section 31 of the Matabeleland Order in Council empowers the High Court of Matabeleland, and section 54 of the Southern Rhodesia Order in Council empowers the new Court of Southern Rhodesia to try criminal cases by a judge sitting alone. Under these circumstances, therefore, I hold that Magna Charta is without any application whatever in these territories, that the Orders in Council brought into force here by Her Majesty were perfectly intra vires under the Foreign Jurisdiction Act, 1890, and that a judge of the High Court of Matabeleland has power, sitting alone, to try criminal cases, and that a judge of the new Court of Southern Rhodesia will have similar powers. I am of opinion, therefore, that the objection raised by counsel for the defence in this case is not good and cannot be upheld.

IN THE PRIVY COUNCIL

Council Chamber, Whitehall,
Friday, January,27, 1899.

Counsel for the Petitioner: Mr. John F.P. Rawlinson, Q.C. and the Hon. Alfred Lyttelton, instructed by Messrs. Marten, Meredith & Henderson.

MR. RAWLINSON:- I appear, my Lords, with my friend Mr. Lyttelton on a Petition for leave to appeal from a Judgment and sentence of Mr. Justice Vintcent, given at Bulawayo, whereby my client was convicted of Larceny, and sentenced to 18 months hard labour which term he is now serving in the Gaol at Bulawayo. Shortly, the judgment of Mr. Justice Vintcent from which we appeal was this: My client claimed to be tried by a Jury, and that request was refused, and a considered judgment was delivered by Mr. Justice Vintcent and it is from that judgment we are appealing. Shortly, the effect of the Justice Vintcent's judgment is this: That although originally the British subjects in Matabeleland had a right to be tried on a criminal charge by a jury, yet that right was taken away by the Matabeleland Order in Council of 1894, made under the Foreign Jurisdiction Act of 1890 and afterwards by the Southern Rhodesia Order in Council which came into force only at the end of last November.

THE LORD CHANCELLOR:- This trial occurred since last November?

MR. RAWLINSON:- Yes, the conviction was on the 9th December. The points I propose shortly being laying before your Lordships are these: That the construction of the Order in Council was wrong. That on the proper construction of the Order there is no doubt that Trial by Jury was not taken away, but in fact expressly left, in that particular district of Matabeleland. The second point is, if it was taken away, the Order being made under the Foreign Jurisdiction Act 1890, it comes under the express proviso of that Act, under Section 12, whereby if there is any provision which conflicts with any Act of Parliament affecting British subjects in that particular country or which is repugnant to any such Act of Parliament, the Order in Council shall be void to that extent, and shall be read subject to that Act of Parliament.

THE LORD CHANCELLOR:- Is there any Act of Parliament which affects British subjects in that part?

MR. RAWLINSON:- Yes, the Act of Parliament is shortly Magna Charta. That is the real Act of Parliament which I am referring to, and which in his judgment the learned judge has held to apply before the order could apply to British subjects in that district. The third point, which is a point of some difficulty and complexity, as to which I hope I shall not have to go into it, is this:- That the Order in Council which purports to be made and which was held by Mr. Justice Vintcent to have been made, under the Foreign Jurisdiction Act, cannot have been made under the Foreign Jurisdiction Act, and the Foreign Jurisdiction Act does not apply at all to any Order in Council purporting to have jurisdiction in Matabeleland. That turns shortly on the decision, as far as it goes, in the case of the Queen v. Jameson tried, some little time ago, where it was necessary to consider the question of how far the district of Matabeleland was within Her Majesty's Dominion.

THE LORD CHANCELLOR:- Would you mind reading us the judgment from which you wish to appeal?

MR. RAWLINSON:- The judgment is a newspaper report, but it is proved by Affidavit and further than that it is obviously

communicated by the learned judge.

THE LORD CHANCELLOR:- That is quite right.

MR. RAWLINSON:- Possibly it would be as well to read the judgment.

THE LORD CHANCELLOR:- We shall understand it better if you read us the judgment.

MR. RAWLINSON:- "The following is a full report of the important judgment of Mr. Justice Vintcent delivered on Friday last, the 9th inst. in the case of Regina v. Staples on the question raised by the defence as to the right of British subjects, to trial by jury: His Lordship said:- 'The presence of the Assessors sitting here may be taken as an indication of what my views are in this case.'" etc. etc. [The learned counsel proceeded to read in extenso the judgment of Mr. Justice Vintcent].

Now, my Lords, the two sections which the learned judge decided upon, and which have been referred to almost interchangeably, because he finds there is no difference between the two are, first, Section 26 of the Matabeleland Order in Council of 1894 which was as follows:- "There shall be a Court of Record styled the High Court of Matabeleland, with full jurisdiction civil and criminal, over all persons, and over all matters within the limits of this Order, and the law to be administered by the High Court and by the Magistrates courts hereinafter mentioned shall, as nearly as the circumstances of the country permit, be the same as the law in force in the Colony at the commencement of this Order." A similar paragraph appears in the new Order in Council, Section 49, subsection 2.

LORD HOBHOUSE:- You say it is practically the same question under both.

MR. RAWLINSON:- Yes. I will read both to show the slight difference between them: "The law to be administered by the High Court and by the Magistrates' courts hereinafter mentioned shall, so far as not inapplicable, be the same as the law in the Colony on the 10th day of June, 1891, except so far as that law has been modified by any Order in Council, Proclamation, Regulation or Ordinance, in force at the date of the commencement of this Order." "The Colony" is defined as being Cape Colony. Then going back to section 25 of the Order of 1894, it continues:- "except so far as that law has been modified by any Order in Council, or proclamation or Ordinance in force at the date of such commencement." Now Jury Law existed in Cape Colony at that time, and therefore that Section would undoubtedly even, as I understand his Lordship's suggestion, put in force the right of trial by jury throughout Matabeleland.

LORD HOBHOUSE:- It preserves the status quo.

THE LORD CHANCELLOR:- Subject to the question of whether the circumstances were different.

MR. RAWLINSON:- There is no suggestion of that as to Bulawayo. No question is decided against us on that point, and it could not be seriously suggested.

THE LORD CHANCELLOR:- I thought that the concluding words of the learned judge were to that effect.

MR. RAWLINSON:- He did not decide to that effect.

THE LORD CHANCELLOR:- That was one ground of his decision, no doubt.

MR. RAWLINSON:- I will deal with that point in one moment. It says "As nearly as the circumstances of the country permit, be

the same, as the law in force in the Colony at the commencement of this Order." Those words:- "As nearly as the circumstances of the country permit" would allow the right of trial by jury in cases in Matabeleland at that time.

THE LORD CHANCELLOR:- You must not assume that. You have a right to contend it but do not assume it.

MR. RAWLINSON:- Subject to its being "As nearly as the circumstances of the country permit."

THE LORD CHANCELLOR:- It is not a question of a particular place where you may get a jury, but of the whole country.

MR. RAWLINSON:- Yes--it is general; it applies the law generally, as nearly as the circumstances of the country permit.

THE LORD CHANCELLOR:- Because you might get one particular place where you could get a jury of 12, that therefore the law would be applicable to that place, if the circumstances of the whole country were such that you could not apply Jury Law at all. I do not say it is so.

MR. RAWLINSON:- That might be so. The point has not been at present found against us and therefore though it may be unnecessary to consider it as a question of fact. I have ample evidence if necessary, I did not propose to adduce it to-day--to show that there is no part of Matabeleland where it could not be easily applicable from a physical point of view, the population having increased so largely.

THE LORD CHANCELLOR:- Have you the qualification for jurors in the Cape Colony?

MR. RAWLINSON:- I do not know what the qualification is.

THE LORD CHANCELLOR:- The fact that the population has increased could not decide the question. You might have a great many black people who did not understand a single word.

MR. RAWLINSON:- I am not speaking of black people because they could not sit at the trial of a British subject.

LORD HOBHOUSE:- You mean where you could actually catch your jurymen.

MR. RAWLINSON:- My British jurymen.

LORD HOBHOUSE:- And have him tried by his peers.

MR. RAWLINSON:- Yes. I am not thoroughly in a position to argue that point, because it has not been held against me by the learned judge below, but I think I should not have the slightest difficulty on the materials I have before me in satisfying you.

THE LORD CHANCELLOR:- It may not become necessary but I thought I would say it was an assumption I do not assent to. You are here asking for leave to appeal, and it is not only the question of whether or not the points raised are sufficient to allow of that appeal on but whether [on] the whole facts as we know them you have a right to appeal.

MR. RAWLINSON:- I may perhaps lay before you in a subsequent portion of my argument some of the information I have as regards the population.

THE LORD CHANCELLOR:- It may not be necessary.

MR. RAWLINSON:- I have the number of the population.

THE LORD CHANCELLOR:- The judge does not take that view.

MR. RAWLINSON:- He has taken it somewhat openly but I will deal with that. I have a mass of information here to show your Lordships, so that you may form the opinion whether or not, assuming the Cape Colony law does apply, the circumstances of the country could permit.

THE LORD CHANCELLOR:- You are not able to answer the question whether the Cape law requires any qualification for a juror such as we have in this country. It is not every British subjuct that can be on a jury.

MR. RAWLINSON:- No. The facts, such as I have, would cover certainly the English qualification, because the vast majority of settlers from here would be qualified certainly in such a town as Bulawayo, to act as jurymen here, and the population of Bulawayo has increased largely of late, and I should be able to show as regards Matabeleland itself, that the population would have an ample margin in the number of people qualified in England, and I presume the qualification would not be higher in the Cape Colony.

THE LORD CHANCELLOR:- I do not know. There is no presumption either way.

MR. RAWLINSON:- I am afraid I should have to ask your Lordships' leave to get further information as to that point. I cannot tell your Lordship the qualification in Cape Colony.

THE LORD CHANCELLOR:- The only reason I remarked upon it was because you assumed that if there were white people there they could constitute a good jury. That does not follow.

MR. RAWLINSON:- If I might read the words of the affidavit upon it it might assist upon that point. It states that the population of Bulawayo, according to the municipal Voters' Roll is 1856 persons, which only includes persons above the age of 21 years having property qualifications which render them liable to act as jurors under the law of the Colony of the Cape of Good Hope.

THE LORD CHANCELLOR:- What you have done there is exactly what I pointed out before. You are speaking of Bulawayo. You must go further and show the circumstances of Matabeleland.

MR. RAWLINSON:- Yes. I think I shall be in a position to show that that does apply to Matabeleland as well. His Lordship's judgment I think has gone on the question of Southern Rhodesia generally which would be a larger area than Matabeleland itself. He speaks of places far beyond which would be wide of this territory, but as regards Matabeleland Bulawayo is the principal place there and I should imagine any important case would be sent for trial there.

THE LORD CHANCELLOR:- You would not contend that if it were established that the circumstances of Bulawayo were such that the law could be applied to it, but the circumstances of the rest of Matabeleland were such that it could not be, the circumstances of Bulawayo with reference to jurors would be sufficient to establish it in all Matabeleland.

MR. RAWLINSON:- No. I should have that difficulty to meet except that Bulawayo would be the Circuit Town.

THE LORD CHANCELLOR:- The Circuit Town will not help you much. That will not do.

MR. RAWLINSON:- It would be the place where the Courts would have to sit.

THE LORD CHANCELLOR:- You must not assume that.

MR. RAWLINSON:- No, my Lord.

THE LORD CHANCELLOR:- I should have thought one of the difficulties would be, that what I will call a unit of criminal jurisdiction would hardly be settled in such a place as that.

MR. RAWLINSON:- At present I can hardly carry it further than a prima facie case, I can only crave your Lordship's assistance in mercy to this extent. The time for us to get this matter forward has been comparatively limited, because our client is in prison, and the matter presses and we have to go on the information--it would have been better if they had given fuller information--given by the affidavit from Bulawayo.

THE LORD CHANCELLOR:- I am only guarding myself against it being suggested that I assume it.

MR. RAWLINSON:- If I may say so, frankly, against myself, the words in the new Order are almost stronger possibly against me, to that extent.

LORD DAVEY:- If the Cape law is applicable I suppose the Judge is the Judge of that particular fact.

MR. RAWLINSON:- Here the Judge has very carefully made his finding on the point.

LORD DAVEY:- The Judge is the person to say whether the circumstances admit of its application. The Proclamation is that the Cape law is to be applied as far as applicable.

MR. RAWLINSON:- That is the old one--"as nearly as the circumstances of the country permit, be the same as the law in force in the Colony at the commencement of this Order."

LORD DAVEY:- Who is to be the judge of those circumstances?

MR. RAWLINSON:- I should rather have a difficulty in saying.

LORD DAVEY:- I do not see how it can be anybody else than the judge who has tried the case. If so it leaves a very large judicial discretion of course in his hands.

MR. RAWLINSON:- I should imagine probably there would be some means.

THE LORD CHANCELLOR:- You would have some difficulty with that because the judge has decided against you.

MR. RAWLINSON:- I submit not. I go back to my old point. The Judge has been very careful not to decide that against me.

LORD DAVEY:- What is the second Proclamation?

MR. RAWLINSON:- The second Proclamation which came into force on the 24th November, 1898, uses these words. "The law to be administered by the High Court and by the Magistrates' Courts hereinafter mentioned shall, so far as not inapplicable, be the same as the law in force in the Colony on the 11th day of June, 1891."

LORD DAVEY:- Who is to say whether it is inapplicable or not?

SIR RICHARD COUCH:- It says:- "so far as not inapplicable."

MR. RAWLINSON:- That is instead of the words "as nearly as the circumstances of the country permit." To that extent it may be

stronger against me. I should submit that upon the proper construction of that Order in the absence of any finding that the circumstances of the country do not permit trial by jury.

LORD DAVEY:- You say that in the absence of any finding. There may be no express words like this:- I find as a fact, so and so, but you must read the whole judgment and see whether the tenor of his judgment is not that the law is inapplicable to that extent.

MR. RAWLINSON:- He is so very careful to guard himself not to do that. He says:- "But with the view I hold in this case it is unnecessary for me to determine that point holding the opinion I do, that section 31 of the Matabeleland Order in Council empowers the High Court of Matabeleland and section 54 of the Southern Rhodesia Order in Council empowers the new Court of Southern Rhodesia to try criminal cases by a judge sitting alone." It is not that he has exercised his discretion, and found against me, where I should be in a difficulty in arguing the point; but here he has expressly repudiated the exercise of his discretion at all, and freely and frankly says he has not gone into it. He says he has gone into the Sections of the Act, and has not gone into that question though we were in a position to have argued the case more fully before him than I am here, though I think I should be able to satisfy your Lordships on those Figures of the prima facie applicability of jury law to Matabeleland itself. These are the two sections that apply to Cape Colony law. The section the learned judge relies on is Section 31 of the Matabeleland Order in Council. "The High Court shall be held at such places as may from time to time be prescribed by Proclamation or Ordinance. The jurisdiction of the High Court may, until other arrangements are made by Proclamation, be exercised by any one judge thereof sitting alone." Those words are identically the same repeated in the Rhodesia Order, Section 54:- "The High Court shall be held at such places as may from time to time be prescribed by the Administrator in Executive Council. The jurisdiction of the High Court may, until other arrangements are made by Proclamation, be exercised by any judge thereof sitting alone." That is the Section relied on by the learned Judge as authorising the Judges to try the criminal cases of any kind alone in that way. Now, my Lords, my submission on that point is this; that is clearly what was intended by that section, but it is simply the ordinary section put in where there is a doubt as to whether two judges shall try certain cases on appeal in the nature of a Divisional Court.

THE LORD CHANCELLOR:- What do you mean by the Ordinary Clause?

MR. RAWLINSON:- Such a section as would be put in--I am afraid I cannot put my finger on one distinctly--as to how many judges of the High Court are necessary to decide certain cases.

THE LORD CHANCELLOR:- Why limit it to that? Why does it not mean what it says?

MR. RAWLINSON:- I should submit that what it says there is, that the jurisdiction of the High Court may be exercised by any judge thereof sitting alone.

LORD DAVEY:- You say that they enlarge the jurisdiction. If the jurisdiction of the High Court was only to try cases of Larceny with a jury it would give power to the same judge to try them himself.

MR. RAWLINSON:- It does not give extra power. In certain cases of appeal from Magistrates it may be necessary to have two judges by Cape Law. I am only dealing with that Section. It is this

section which the learned Judge relies upon and my argument in that point is this. If the Court has no jurisdiction to try, apart from this Section, criminal cases without a Jury--assuming the law for the moment is in my favour--that every person charged with a felony or similarly grave offence, who should be tried by a jury, then this Section is not meant to alter that state of affairs. It is not passed with that intention and it is dealing simply with a question which applies equally to civil as to criminal procedure, as to whether in any case it might be argued that a Divisional Court should be necessary in Cape Town for certain appeals, that should not apply to Rhodesia.

THE LORD CHANCELLOR:- I do not quite follow you because the High Court of Justice in the first instance has a full jurisdiction, civil and criminal, over all persons.

MR. RAWLINSON:- Yes. The way I am putting it is that they could not apply, assuming the law is applied to the Cape.

THE LORD CHANCELLOR:- That does not matter.

LORD DAVEY:- That is subject to the provisions of the Proclamation.

MR. RAWLINSON:- Yes.

THE LORD CHANCELLOR:- I am not dealing with that.

LORD DAVEY:- If the High Court has jurisdiction to try a criminal offence without a Jury then one judge can do it.

MR. RAWLINSON:- Certainly--the same with civil cases, and I say that that is all that Section 31 means that in certain cases two judges might be required.

LORD DAVEY:- The whole question is whether the Court had the jurisdiction or not.

MR. RAWLINSON:- That is the real question under that paragraph I read before what is applying Cape Colony law by that Order.

LORD DAVEY:- As far as applicable.

MR. RAWLINSON:- Yes, as far as applicable--whether the application of Cape Colony law did not give the right of trial by jury, and take away the jurisdiction of even two judges of the High Court to try prisoners alone. That being so, Section 54 of the new Order and Section 31 of the old one are merely administrative saying that as to all things to be done by judges one judge is sufficient. In the same way you might have two judges acting in certain cases in England and one in others.

THE LORD CHANCELLOR:- I do not think I quite follow you. You say it is tacitly implied, in the exercise of either civil or criminal jurisdiction by the Cape Court sitting with a Jury.

MR. RAWLINSON:- If your Lordship would leave out the words:- "As nearly as the circumstances of the country permit."

THE LORD CHANCELLOR:- I am not dealing with that.

MR. RAWLINSON:- Then I can read the Order exactly in this way. Paragraph 26 would be this:- "There shall be a Court of Record styled the High Court of Matabeleland, with full jurisdiction, civil and criminal over all persons and over all matters within

the limits of this Order, and the Law to be administered by the High Court"--then leave out the words:- "as far as the circumstances permit--"shall be the law of Cape Colony"; and part of that is that they shall try criminal cases with a jury.

THE LORD CHANCELLOR:- That is a different matter. I should have thought the law there did not mean the course of practice.

MR. RAWLINSON:- It shall be:- "The same as the law in force in the Colony at the commencement of this Order except so far as the law has been modified by any Order in Council or Proclamation or Ordinance in force at the date of such commencement." Then:- "the Court shall give effect to other matters, and then they go to the question of civil law. Assuming that in my favour I say they are distinctly called on to try by jury, subject to the provisions of the paragraph relied on by the learned Judge.

LORD DAVEY:- Does the Statute law of Cape Colony give an absolute right to a Jury in case of larceny?

MR. RAWLINSON:- Yes.

THE LORD CHANCELLOR:- Section 33 is not without its importance. It does not look to me as if there was any assumption that there was to be a jury. The sentence of death is passed by the Judge but the man is not to be executed without confirmation by the High Commissioner. It does not look to me as if there was any idea that a Jury were to try.

MR. RAWLINSON:- I should have submitted that is simply to take the place of the Home Office in England and the reason of the respite is that the information has to get to Cape Town and back again.

THE LORD CHANCELLOR:- I do not think that is quite analogous. The Home Office is the responsible officer advising the mercy of the Crown.

MR. RAWLINSON:- Would not that be all that the High Commissioner would be doing?

THE LORD CHANCELLOR:- That is the other way. Sentence of death is not to be carried into effect until confirmed by the High Commissioner, and a copy of the audience has been transmitted to him.

MR. RAWLINSON:- In Section 33 "The High Commissioner may remit or commute in whole or in part any sentence of the High Court." It is only the prerogative of mercy.

LORD DAVEY:- It is more like an appeal.

MR. RAWLINSON:- He could not upset the sentence, and say that the person sentenced to death has been wrongly found guilty, and is not guilty of the crime charged.

LORD DAVEY:- Supposing it was said that no judgment of a judge condemning a man to death shall be carried into execution until confirmed by the Crown, the Crown would not simply be exercising its prerogative of mercy.

MR. RAWLINSON:- All he can do is to remit or commute in whole or in part. The words are:- "The High Commissioner may remit or commute in whole or in part any sentence of the High Court." Then Section 32 says:- "If any sentence of death is pronounced by the High Court a copy of the evidence shall be transmitted to the High Commissioner and the sentence shall not be carried

into effect until confirmed by him." That is the sentence confirmed--not the verdict or judgment but the literal carrying out of the sentence.

SIR RICHARD COUCH:- That is like the provision in India as to the High Court. No sentence of death can be carried into effect there without it is confirmed.

MR. RAWLINSON:- He may signify his confirmation by telegraph. That is not of the judgment. That is of the carrying into execution of the particular sentence. As far as that consideration is concerned I do crave in aid as far as it goes Section 12 of the Foreign Jurisdiction Act 1890. His Lordship in the Court below has quoted only subsection 2 of that Section, and therefore has to a certain extent missed its application. The section runs this way: Mr. Justice Vintcent has assumed that Magna Charta applied to British subjects until the Matabeleland Order in Council was passed.

THE LORD CHANCELLOR:- The effect of that Statute was--I have some reason to know--that it got rid of all questions of acquiring territories by cession, or conquest, or settlement, but it gave Her Majesty absolute power to say what law should be applied, as if it was by absolute conquest, did not it?

MR. RAWLINSON:- No, my Lord. I think that is the British Settlements Act.

THE LORD CHANCELLOR:- I think it is the Foreign Jurisdiction Act. Questions have sometimes arisen whether Her Majesty had as you have been arguing to-day the power by Order in Council to deal with places where, by settlement or cession some other state of law existed, and I think it was supposed that that Statute had settled the question finally.

MR. RAWLINSON:- I should have submitted that the distinction between cessions--with which, if I may say so, I am familiar for the moment--is not emphasized in the Foreign Jurisdiction Act. The expression is:- "In as ample a manner as if Her Majesty had acquired the jurisdiction by conquest or cession of the territory."

THE LORD CHANCELLOR:- That is quite right.

MR. RAWLINSON:- Possibly I may be misunderstanding for a moment--

THE LORD CHANCELLOR:- "It is and shall be lawful for Her Majesty the Queen to hold, exercise and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country, in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory." There is no doubt that under such circumstances as these if She has conquered territory She may make what laws She pleases.

MR. RAWLINSON:- That was under the old Act.

THE LORD CHANCELLOR:- That is the Act of 1890, is not it?

MR. RAWLINSON:- Yes, but under Section 12 I think you will find that that has been expressly guarded against. That is the construction I am asking your Lordships to put on Subsection 1 of Section 12:- "If any Order in Council made in pursuance of this Act as respects any foreign country is in any respect repugnant to the provisions of any Act of Parliament extending to Her Majesty's subjects in that country."

THE LORD CHANCELLOR:- "In that country"--yes.

MR. RAWLINSON:- There was the decision of your Lordships in the Queen v. Carew under previous Foreign Jurisdiction Acts. As far as I know--I have not gone into it as far as I should

like--I believe this is a new paragraph.

THE LORD CHANCELLOR:- I think the meaning of that was this, that it gives the Queen complete power to legislate for the which [sic] by hypothesis is to be treated as a conquered country, yet if Parliament in respect of that same country has passed an enactment on the subject, Her Majesty is not given power to alter that.

MR. RAWLINSON:- Extending to Her Majesty's subjects in that country, not an Act of Parliament with reference to that country.

THE LORD CHANCELLOR:- That means extending, I think.

MR. RAWLINSON:- I should have submitted that that was clearly put in to prevent what was happening before. It was put in to provide that where an established right existed in British subjects in this particular district an Order in Council should not take away that right. It is held that a particular Act of Parliament applies to all British subjects in that particular country. Without the sanction of an Act of Parliament Her Majesty in Council could not take away that right and wherever there is an Order in Council made, that is in any respect repugnant to the provisions of any such Act of Parliament that is an Act of Parliament extending to Her Majesty's subjects in that country, it shall be read subject to that Act, and shall to the extent of that repugnancy, but not otherwise, be void.

LORD HOBHOUSE:- Has Matabeleland remained foreign territory?.

MR. RAWLINSON:- That is the third point I am coming to.

LORD HOBHOUSE:- The Foreign Jurisdiction Act is at an end if it has become British territory.

MR. RAWLINSON:- That is the third which I shadowed forth which I said I was hopeful not to have to argue today because of the far-reaching consequences on a decision on that point, but I have the fullest authority here on that point.

My next point is that Mr. Justice Vintcent did not read Subsection 1 of Section 12 correctly, and that that is expressly meant to meet such a case as this; that where rights exist, as is assumed, in the Judgment, of British subjects in some particular country under an Act of Parliament an Order in Council should not take away those rights, but that so far as it is contrary to that Act the Order in Council shall be held to be void.

THE LORD CHANCELLOR:- That would be a far-reaching decision. Apply it in this form. Assume that under the words:- "Any Act of Parliament dealing with Her Majesty's subjects in that country" Magna Charta does apply what authority has Her Majesty in Council to erect any Courts at all.

MR. RAWLINSON:- I should imagine She would have power to erect all courts under Magna Charta.

THE LORD CHANCELLOR:- I do not think so. She cannot erect new courts.

MR. RAWLINSON:- Not of a new nature, but I should have thought she could erect a common law court.

THE LORD CHANCELLOR:- I do not know what that is.

MR. RAWLINSON:- I mean as opposed to a Chancery Court.

LORD DAVEY:- If it is a foreign country within the meaning of the Foreign Jurisdiction Act, 1890, what appeal is there?

MR. RAWLINSON:- The Appeal as far as I understand it would be this, that it would be within Her Majesty's Dominions, and that this has been done by a Judge.

LORD DAVEY:- Within Her Majesty's dominions? If it is within Her Majesty's dominions it is not a foreign country, and not within the Foreign Jurisdiction Act, 1890.

MR. RAWLINSON:- I say if it is within Her Majesty's Dominions--assuming that it is--then it would not be under the control of the Foreign Jurisdiction Act at all, it would be simply like any other part of Her Majesty's dominions, and this power of making Orders in Council under the Foreign Jurisdiction Act would not apply. It is purporting to act under the Foreign Jurisdiction Act, and I say it is wrongly done.

LORD DAVEY:- I thought your point was it was a foreign country.

MR. RAWLINSON:- No, that it is not a foreign country and therefore not within the Foreign Jurisdiction Act. My point at present is that assuming it is within the Foreign Jurisdiction Act, this last Order purports to be made and is made entirely under the powers of the Foreign Jurisdiction Act. The Judge below said this power is granted by the Foreign Jurisdiction Act alone and the words of the preamble of the Order are:- "Now, therefore, Her Majesty, by virtue and in exercise of the powers, by the Foreign Jurisdiction Act 1890 or otherwise in Her Majesty vested, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered as follows".

The point I am making here is, assuming this is rightly made under the Foreign Jurisdiction Act, then Section 12, Subsection 1 protects me, and I say, this is the very Order that is not to be made. That is an Order made that is repugnant to any Act of Parliament extending to Her Majesty's subjects in that country.

THE LORD CHANCELLOR:- Is that the true effect of those words, that it is an Act of Parliament extending to Her Majesty's subjects in Her Dominions? I think that means expressly extending. You mean that any British subject wherever he is is entitled to trial by Jury.

MR. RAWLINSON:- Magna Charta goes with him when settling in that particular country. I do not mean the number, or other matters of procedure, but the general right would follow him, and it has been assumed throughout that this is so, and that the question is whether or not this right is taken away from him.

THE LORD CHANCELLOR:- I think you a little undervalue what the learned Judge says. I think he avoids saying that. He says even assuming for the purpose of argument. He does not affect to decide you are entitled to it, but he says even if you were entitled.

MR. RAWLINSON:- Possibly I may be exaggerating what the learned judge has said. I think the expression he uses is; let us assume for the sake of argument.

THE LORD CHANCELLOR:- That is exactly what I say. You are putting it that he decided the question, but I do not think he did.

MR. RAWLINSON:- The whole judgment is based on that assumption.

THE LORD CHANCELLOR:- The judgment is on that hypothesis.

MR. RAWLINSON:- That is sufficient for me perhaps. I hope to show it has gone on that assumption and, if necessary, I think I can show it is correct in saying that when British subjects to to a country they would carry certain common law rights with them wherever they go. Upon that I should have to say one or two words in quoting that case of Campbell v. Hall.

The third point which I desire to address your Lordships upon is the Order in Council that purports to be made under the Foreign Jurisdiction Act. The literal one that applies is the South Rhodesia Order in Council dated the 25th November, 1898. It was to come into force directly it was published in the Gazette and that was published on the 25th November, 1898. In Section 91 it says:- "The Matabeleland Order in Council,1894, shall continue in force until the commencement of this Order, and shall thereupon be revoked, but without prejudice to anything done thereunder." Therefore I think it is clear this Order was in operation on the 25th November. My client was tried on the 9th December and therefore this would be the Order which I have to consider. It recites:- "That by virtue of the powers by the Foreign Jurisdiction Act, 1890, or otherwise in Her Majesty vested, it is ordered" and so on. The whole Order is made and passed by Her Majesty's Privy Council on the assumption that it comes under the Foreign Jurisdiction Act, and that they are dealing with a Foreign country. What I want to show is that the Foreign Jurisdiction Act does not apply at all, and does not apply in Matabeleland in any way.

THE LORD CHANCELLOR:- Why not?

MR. RAWLINSON:- For this reason. The Foreign Jurisdiction Act says in section 1:- "It shall be lawful for Her Majesty the Queen to have exercise and enjoy any jurisdiction which Her Majesty now has or may hereafter have in any foreign country." There is a definition clause which says "The expression foreign country means any country or place out of Her Majesty's Dominions."

SIR RICHARD COUCH:- The Preamble says that the Act relates to the exercise of Her Majesty's jurisdiction out of Her Dominions.

MR. RAWLINSON:- Certainly, and the definition clause repeats those words.

THE LORD CHANCELLOR:- I do not quite follow you. Do you say that Matabeleland is in Her Majesty's Dominions?

MR. RAWLINSON:- That is what I propose to argue.

THE LORD CHANCELLOR:- That is a very odd thing because the Order in Council itself rather negatives that view does not it?

MR. RAWLINSON:- It does. I admit the difficulty I have to meet and I meet it in this way. The same question arose, or substantially the same--there is such a small variation that I may be allowed to say the same--in the case of the Queen v. Jameson that was tried in 1896. My friend, Mr. Lyttelton, and myself were in the case, and it became material to determine in the course of that case, two points, first, whether a place called Mafeking was in Her Majesty's Dominions and, secondly, whether a place Pitsani Potlugo, which is in the Chartered Company's territory, was in Her Majesty's dominions.

THE LORD CHANCELLOR:- How was that material? That was a case

of British subjects making war on a foreign state in amity with Her Majesty. That was an offence.

MR. RAWLINSON:- It was held to be material because the Foreign Enlistment Act uses the expression--that is the Act under which the prosecution took place--"Within the limits of Her Majesty's Dominions" and the point taken by Sir Edward Clark--I have the shorthand notes here--which was argued by him for a day and a half, was that it was material and it was admitted by the Crown and everybody to be material, to consider whether those two places, Mafeking and Pitsani Potlugo were within Her Majesty's Dominions. As regards Mafeking, there was no difficulty.

THE LORD CHANCELLOR:- Was not that so far as that matter was concerned treated as a matter of fact?

MR. RAWLINSON:- I admit it was, and I say that quite fairly. There were three judges whose remarks I propose to use as my arguments before your Lordships, who had to deal with that very district of the Chartered Company, and they had finally to leave certain questions of fact to the Jury, which would determine whether they would hold that Pitsani Potlugo was within Her Majesty's Dominions; yet those arguments which I propose to use with your Lordships' permission as my arguments in this case show very clearly that those three judges who had heard the argument at great length had a very strong opinion that Pitsani Potlugo was within Her Majesty's Dominions.

THE LORD CHANCELLOR:- Was not that question of fact--the exercise of jurisdiction and so on, which they considered--established as a question of fact that it was within Her Majesty's Dominions?

MR. RAWLINSON:- Certainly.

THE LORD CHANCELLOR:- That is not true of Matabeleland.

MR. RAWLINSON:- Yes.

THE LORD CHANCELLOR:- Speaking generally of Matabeleland here is an Order in Council in which the words used expressly exclude it being Her Majesty's Dominions.

MR. RAWLINSON:- So it did Pitsani Potlugo.

THE LORD CHANCELLOR:- That is under the protection of Her Majesty the Queen.

MR. RAWLINSON:- And I say that particular place which was found in July, 1896, to be within Her Majesty's Dominions is included in this Order in Council and the Foreign Jurisdiction Act is made to apply to it.

THE LORD CHANCELLOR:- At present I do not assume that view. It seems to me that that is the strangest thing I ever heard, that the Sovereign who repudiates it as Her Dominions is to have it proved against Her that they are Her Dominions.

MR. RAWLINSON:- I did not mean to put it in any way offensively, only my argument is undoubtedly that either by inadvertence or something of the kind, or by error this has been done, or purports to be done under the Foreign Jurisdiction Act.

THE LORD CHANCELLOR:- I never heard that you can force a Sovereign to take territory.

MR. RAWLINSON:- No, but the Sovereign has in this case taken it.

THE LORD CHANCELLOR:- She says She has not.

MR. RAWLINSON:- That is the Order in Council I am contending against.

LORD DAVEY:- It is the mistake of the persons who advised Her Majesty. You must say that.

MR. RAWLINSON:- I am afraid I must. I tried to hedge it by saying I did not say it offensively. I am grateful to see that Her Majesty's Attorney-General is out of Court for a moment, but I have here Her Majesty's Attorney General's argument extending over four or five pages to the effect that this particular district or part of it--and it was successfully argued--was within Her Majesty's Dominions at that time.

THE LORD CHANCELLOR:- If you treat it as a question of fact dealing with a particular piece of territory it may or may not be conclusive on the parties to the transaction. I certainly, for one, should absolutely refuse to take a question of fact found to decide whether Matabeleland is part of Her Majesty's Dominions.

MR. RAWLINSON:- I am not asking that.

LORD DAVEY:- All they had to argue there was that it was part of Bechuanaland.

MR. RAWLINSON:- That was Mafeking. Mafeking was in Bechuana-land.

LORD DAVEY:_ Which is British territory within the meaning of the Foreign Enlistment Act.

MR. RAWLINSON:- Within Her Majesty's Dominions. That is the governing point throughout. A man is convicted under this Order which had been in force at the time for some ten or twelve days. The point I am making is that that Order was passed mistakenly as far a s jurisdiction was concerned; that that Order which came into force on the 25th November could not have been made under the Foreign Jurisdiction Act, and how the slip occurred if slip it is, is quite easy to understand. As far as that is concerned I do submit that here for no purpose can Bulawayo be said to be a foreign country, that is a country outside Her Majesty's dominions.

THE LORD CHANCELLOR:- I suppose a foreign country is a place outside Her Majesty's Dominions, and a place outside Her Majesty's Dominions is a foreign country.

MR. RAWLINSON:- I say it is.

THE LORD CHANCELLOR:- The particular order in which you put that proposition does not matter, does it?

MR. RAWLINSON:- No, it does not. My submission is that would necessitate dealing to a certain extent with the history of Matabeleland. As far as that is concerned, the position, so far as it is traceable, comes to this. To begin with, there is a charter given to the British South Africa Company. I submit that that Charter alone clearly would make it--if it is necessary to carry it as far as that--within the Dominions of Her Majesty, and that is the only point which has to be determined. If it is a question of fact, then the only way I can satisfy your Lordships upon it is by going through the different acts, as my Lord put it to me, of jurisdiction, and

the different acts of ownership which have been exercised by the Crown from time to time, and which have been set out one after the other in the particular argument I have referred to,, and I should be able to show that Matabeleland was not a place referred to in the Foreign Jurisdiction Act.

THE LORD CHANCELLOR:- I quite understand that generally speaking an act of authority, or jurisdiction, or whatever you call it, may be some evidence of ownership, and therefore you may say that if there was no such thing known as protection to a foreign country, those would be acts from which persons would infer jurisdiction, and therefore ownership, but once you admit there is such a thing as protection by one country over another, and that Her Majesty does in various parts of the world exercise protection, and does things in those countries, because She assumes to be the protector of such countries, I do not see why you are entitled to say that those are acts of ownership rather than protection.

SIR RICHARD COUCH:- Look at Section 15 of the Foreign Jurisdiction Act. That seems to draw a distinction between dominion and protection.

LORD HOBHOUSE:- To countries under protection the Foreign Jurisdiction Act would apply.

MR. RAWLINSON:- Certainly. The suggestion I was making is that this is a case of more than protection; that in the case of genuine protection you would not find what is going on here at every turn; you would not find the right of flying a flag to denote the British---

THE LORD CHANCELLOR:- The British what?

MR. RAWLINSON:- The British character.

THE LORD CHANCELLOR:- I think you very nearly said British protection.

MR. RAWLINSON:- No, my Lord--honestly, I thought I was misquoting the particular charter.

THE LORD CHANCELLOR:- However, really, of course. the exercise of civil and criminal jurisdiction prima facie no doubt would import the fact that the person so exercising jurisdiction would be the Sovereign of the country or his Agents or Ministers, but it can hardly be denied that Her Majesty does exercise jurisdiction by Courts in places which are out of Her Dominions.

MR. RAWLINSON:- Certainly.

THE LORD CHANCELLOR:- You get rid of what I may call the prima facie meaning of exercising jurisdiction, once you admit there is such a thing as protection by one country over another, involving in it the administration of justice.

MR. RAWLINSON:- I am going a step further here, and I hope to be able to show that literally with reference to Orders that have been applied from time to time to this particular piece of country, there is far more than that. That this is in no sense a Protectorate.

THE LORD CHANCELLOR:- Is there any act of State or anything which recognises it as part of Her Majesty's Dominions?

MR. RAWLINSON:- There is this very lengthy argument.

THE LORD CHANCELLOR:- No, that is what somebody else said about it. I am asking for any act of State recognising this as part of Her Majesty's Dominions. That is rather a serious proposition.

MR. RAWLINSON:- There is the Charter itself.

LORD DAVEY:- That Charter authorising the body incorporated by that Charter to take possession of, it does not say it is Her Majesty's Dominions. It enables them to exercise jurisdiction over the land, if they can acquire it by lawful means, and it incorporates them for that purpose.

MR. RAWLINSON:- I think this particular one goes further.

LORD HOBHOUSE:- Has there ever been in Matabeleland any such settled government as would give to Her Majesty jurisdiction by treaty or acquiescence and so on?

MR. RAWLINSON:- There has certainly been a settled government in Matabeleland.

LORD HOBHOUSE:- I should think there has been a very unsettled state of affairs, and that it would come within the second clause of the Foreign Jurisdiction Act.

MR. RAWLINSON:- I should submit it has been hardly unsettled for the last five or six years. This Order in Council was made in November of last year, but it has been a matter of common knowledge the state of the country for some years.

LORD HOBHOUSE:- If the jurisdiction is created under Section 2 of the Act by British subjects going and settling in a country that practically has no orderly government at all then Her Majesty has jurisdiction under the Foreign Jurisdiction Acts. If that was acquired, when was it lost? It could only be lost if the territory becomes British territory, I should think.

MR. RAWLINSON:- Possibly.

LORD HOBHOUSE:- As I understand the Order of 1898 proceeds on the supposition that the territory is not British territory but protected territory.

MR. RAWLINSON:- That is what I have to meet.

LORD HOBHOUSE:- Protected territory falls under the Foreign Jurisdiction Act.

MR. RAWLINSON:- If that Order in Council is right I agree at once this point goes. What I argue is that that is not so.

LORD HOBHOUSE:- It is either under Section 2, or within "protected territory" in the later Section.

MR. RAWLINSON:- The governing words in both are "foreign country".

LORD HOBHOUSE:- It shows the meaning of protected territory.

THE LORD CHANCELLOR:- Foreign country is defined.

MR. RAWLINSON:- Yes, in Section 16.

THE LORD CHANCELLOR:- "Any country or place out of Her Majesty's Dominions."

MR. RAWLINSON:- That is the point.

THE LORD CHANCELLOR:- It must be either in or out.

MR. RAWLINSON:- That is my point. If it is out of Her Majesty's Dominions my point is gone.

LORD HOBHOUSE:- Section 15 though that only applies to India shows that countries enjoying Her Majesty's protection are not

Her Majesty's Dominions.

MR. RAWLINSON:- If I do not show there is no more than a Protectorate, my point as far as this goes is quite at an end. I have to satisfy your Lordships that this country is not a mere protectorate but is within Her Majesty's Dominions.

LORD HOBHOUSE:- Was not the Order of 1898 issued on the footing that it is a protected country?

MR. RAWLINSON:- Certainly.

LORD HOBHOUSE:- Can we say the contrary in construing the Order?

THE LORD CHANCELLOR:- I do not know at present--perhaps you will show me if I am wrong--any mode in which when a territory which the Sovereign herself declines to accept as part of Her Dominions can be made part of Her Dominions. I never heard of such a thing being done. It is unknown to international law that you can force any country to take territory they have never assumed the sovereignty of.

MR. RAWLINSON:- The way I should put it is this. That is the question I am dealing with--whether Her Majesty has refused in that way.

THE LORD CHANCELLOR:- This is the language of the Sovereign.

MR. RAWLINSON:- I submit that this Order in Council is drawn on a misapprehension.

THE LORD CHANCELLOR:- We have nothing to do with that. Here it is. It is an Order in Council by Her Majesty.

MR. RAWLINSON:- If it is like an Act of Parliament and I cannot go behind it my argument fails.

THE LORD CHANCELLOR:- I do not say for some purposes you could not but for this purpose when you are trying to force on a Sovereign the dominion of a country which the Sovereign refuses to take.

MR. RAWLINSON:- By that Order.

THE LORD CHANCELLOR:- You cannot go behind Her Majesty's own word.

MR. RAWLINSON:- If I might take an extreme case to illustrate my argument. Supposing in 1898 Her Majesty had unquestionably taken over the whole of the country by annexation or in some other method would the mere fact that the Order in Council is drawn up at the end of the year on what I submit is the wrong basis estop me from going behind it and showing it was ultra vires. The time has passed when these Orders in Council can be made for that territory.

LORD DAVEY:- Do not let me interrupt you if you have not finished this point, but I want to clear up this. There was a proclamation made in 1895.

MR. RAWLINSON:- Yes.

LORD DAVEY:- That was made under the power given to the High Commissioner by an Order in Council.

MR. RAWLINSON:- Yes.

LORD DAVEY:- That Proclamation provided for the Cape law being applied as far as it is not inapplicable--those are

not quite the exact words.

MR. RAWLINSON:- That is the Matabeleland Order.

LORD DAVEY:- Then the Proclamation of 1895 provided for the exercise of criminal jurisdiction with the assistance of four assessors if the Court thought fit.

MR. RAWLINSON:- I have never seen and I have never been able to get, in the time I have had at my disposal, a copy of that Proclamation.

LORD DAVEY:- It is no doubt referred to in the Judgment.

MR. RAWLINSON:- That is all I know of it.

LORD DAVEY:- Reading those together does it not rather negative the idea that there was any right to a Jury if you give the Judge power to summon assessors to hear offences and I found that in the same document, or in a document which has to be read together with another document, containing this power to try criminal cases. Does not that rather negative any right to a Jury?

MR. RAWLINSON:- Your Lordship remembers the judgment, and that is very fairly put by Mr. Justice Vintcent. He says I felt the difficulty in the case and I asked for the Order, and the Order was made at my request. That is an Order he got made.

LORD DAVEY:- If you rely for the introduction of Cape law on the Order in Council you must qualify that so far as applicable by any provision in a document meant to be read with the same Order and as part of the same Order saying that in criminal cases you have four assessors which negatives any right of Trial by Jury under the previous words introducing the Cape law so far as applicable.

MR. RAWLINSON:- What is the Proclamation?

LORD DAVEY:- It issues from the same source as the Order in Council.

MR. RAWLINSON:- Yes, that is so.

LORD DAVEY:- It has to be read with the Order.

MR. RAWLINSON:- That is a point I am appealing against. I do not know if I might say this as regards the point I am embarking on now. Of course, it is a question involving an important matter because this man is serving his sentence of eighteen months' hard labour. If it is a question of reasonable doubt if I might put it as high as that--and we have been unable to get thoroughly at the bottom of this very broad question--supposing I show to your Lordships here that this is a genuine case of real doubt whether or not the case has or has not been tried in an improper method. I should ask most respectfully that I should have an adjournment to go into my point, and satisfy your Lordships upon it. For instance, as regards the applicability of the question of Juries to Bulawayo, it would be impossible for me to bring full evidence before your Lordships now, but subject to that, I am only too pleased to put the case, as I understand it, before your Lordships today.

As regards the point Lord Davey was kind enough to put to me at that moment, the Proclamation must necessarily stand or go with the Judge's judgment. I submit his view was as he stated that he had a right or a duty to sit and try prisoners alone. That being so and on that assumption and that assumption only he had what would amount to a Rule of Court, namely a

Proclamation adding to the Order in Council that in certain cases the Judge should have the assistance of assessors to try this particular case[;] no doubt assessors were there and we have the facts which occurred with regard to these assessors. The assessors were not unanimous and as your Lordships see on the affidavit here one of the assessors was not satisfied with the evidence of my client's guilt.

THE LORD CHANCELLOR:- I do not see what that has to do with it. If my noble and learned friend's point is good what he points out is that this Order in Council affects the mode of trial.

MR. RAWLINSON:- Yes. It is not suggested that the Proclamation applies to the Cape. The proclamation applied to Matabeleland at his request as Mr. Justice Vintcent said would would go with the rest of the case.

LORD DAVEY:- It would go if the Order in Council was bad.

MR. RAWLINSON:- Might I not carry it further than that and say supposing your Lordships' view is that the Cape law was applied in Bulawayo at that time and that Section 51 gives no further power--if my contention was right--if your Lordships felt that then surely the Proclamation that is made is a rule of court under that Order, and the same misapprehension as to the construction of the Order, would be of no avail in this particular case. I should hope I might take it as high as that. Then perhaps I might deal with the third point that before that Order in Council can be of any avail at all you must show the Foreign Jurisdiction Act applies to the country.

THE LORD CHANCELLOR:- You must show it is part of Her Majesty's Dominions.

MR. RAWLINSON:- And therefore the Foreign Jurisdiction Act does not apply.

THE LORD CHANCELLOR:- If not part of Her Majesty's Dominions, it is a foreign country.

MR. RAWLINSON:- Yes.

THE LORD CHANCELLOR:- You have to show it is part of Her Majesty's Dominions.

MR. RAWLINSON:- Certainly.

THE LORD CHANCELLOR:- That seems to me to be a rather extraordinary and somewhat bold contention.

MR. RAWLINSON:- Yes.

SIR RICHARD COUCH:- Or a protected country. On the face of this Order, the Order recites that it is under the protection of Her Majesty.

MR. RAWLINSON:- That is so.

LORD HOBHOUSE:- And this is the very Order we are construing.

MR. RAWLINSON:- Then I am asking you to construe it and override it.

LORD HOBHOUSE:- Can we go behind that assertion and say Her Majesty has Dominion when She says She has not?

LORD DAVEY:- You have been deprived of your right to be tried by a Jury by an Order Her Majesty was badly advised to issue.

MR. RAWLINSON:- Under an Act which has no application.

THE LORD CHANCELLOR:- I think my noble and learned friend has understated it--not badly advised but it has no authority at all.

MR. RAWLINSON:- I hope I am not shirking the point. The first material point is the Charter itself.

THE LORD CHANCELLOR:- Do you say that a Charter giving authority to persons to be incorporated as a Company in a foreign country is an act of jurisdiction over that country to make it Her Majesty's Dominion.

MR. RAWLINSON:- No, but when you look at the Charter you say that it is a fair construction.

THE LORD CHANCELLOR:- What language do you rely on to shew that it is something to shew that Her Majesty has exercised territorial jurisdiction over the place?

MR. RAWLINSON:- May I put it in this form using for the moment somebody else's words:- "Now we come to what is in many respects an important fact, namely the Charter of the British South Africa Company, which was granted by the Queen on the 29th October, 1889. Let me at once point out that so far from this Charter of the Queen to the British South Africa Company divesting her of any dominion or of any sovereign authority, if She had such, so far from its having that effect, the very fact of its being granted is a fact going to shew that the Queen was, in fact, exercising dominion and authority, insofar as by that Charter She gives to the Chartered Company the creation of British law, delegated authority or functions to exercise certain powers and authorities in the nature of law making, in the nature of governing, in the nature of administration such as are set out in the Charter. It recites that it would be a good thing(and I will not trouble you by reading the words) if the Charter were granted, and then it begins clause 1. 'Then Lord Russell reads the Clause, defining the field of operations of the British South Africa Company.' Then he goes on again: "It is not necessary to trouble you with the map. This was in point of fact given to the Chartered Company to do certain things and pointing out that their field of operations, an enormously extensive field, was to begin at the Southern Rhodesia boundary, from the north boundary of British Bechuanaland."

THE LORD CHANCELLOR:- Forgive me for pointing out that what the learned judge is saying is this, that this does not divest Her Majesty of any dominion She already possesses. That would be true enough. That is the head of the sentence.

MR. RAWLINSON:- Yes, but he goes further than that. The only question he is upon is whether or not this place Pitsani Potlugo is within the dominions of the Queen. That is the question he has to determine.

LORD DAVEY:- Had he the Act before him?

MR. RAWLINSON:- The words are the same in the Foreign Enlistment Act as in the Foreign Jurisdiction Act.

THE LORD CHANCELLOR:- Can you refer me to the Foreign Jurisdiction Act? I did not know the words were the same.

MR. RAWLINSON:- It is the Act of 1870. It says:- "This Act shall extend to all the dominions of Her Majesty including the adjacent territorial waters." Then Section 3:- "This Act shall come into operation in the United Kingdom immediately on the passing thereof and shall be proclaimed in every British possession by the Governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in the British possession on the day of such Proclamation." That is the Foreign Enlistment Act of 1870, the 33 & 34 Vic. Cap. 90.

LORD HOBHOUSE:- Is this Lord Russell's charge to the Jury in the Jameson case?

MR. RAWLINSON:- Yes.

THE LORD CHANCELLOR:- Was there any finding by the Jury on that?

MR. RAWLINSON:- Yes.

THE LORD CHANCELLOR:- What did they find?

MR. RAWLINSON:- The question was left in this form:- "I propose to put the same question to you exactly as to Pitsani Potlugo, plus this further question:- 'Did Her Majesty the Queen by Her representatives exercise in fact dominion and sovereignty in the district in which Pitsani Potlugo is situated?'" The point he had put before was whether it was in Her Majesty's Dominions. The Jury answered that in the affirmative and upon that the conviction followed.

THE LORD CHANCELLOR:- I do not quite understand that form of it. Did she exercise jurisdiction?

MR. RAWLINSON:- It was a special verdict.

SIR RICHARD COUCH:- Dominion and sovereignty.

MR. RAWLINSON:- Lord Russell said:- "Now I turn to Pitsani Potlugo as to which undoubtedly there are considerations of a different kind to be considered. But, in this case as in the other (if it be necessary to deal with the Pitsani matter at all for a reason I mentioned before--if it be essential to the Crown to establish the expedition at Pitsani as an offence against the Act) they have again to prove two things: First, that Pitsani Potlugo is within the dominion of the Queen, and secondly, that the Act of 1870 was in operation there." The first thing is that Pitsani Potlugo is within the dominion of the Queen. Lord Russell said the Crown would have to prove that before we could go on. That is part of his charge. Then he left this question in writing to the Jury. "Did Her Majesty the Queen by Her representatives exercise, in fact, dominion and sovereignty in the district in which Pitsani Potlugo is situated?" That was left for the purpose of determining the question he put before, was Pitsani Potlugo within the dominion of the Queen.

SIR RICHARD COUCH:- The jury found that in the affirmative?

MR. RAWLINSON:- Yes.

LORD DAVEY:- For the purpose of that Act he considered the expression "within the dominion of the Queen" as meaning a place in which the Queen exercises some jurisdiction in the nature of sovereignty.

MR. RAWLINSON:- The words are the same. I do not know that the argument I propose to read will bear that out. It was being construed strictly against the Crown because it was a criminal

charge against people and as his Lordship said the Crown had to prove everything strictly and fairly. Here on the other hand it is in favour of liberty and the construction I submit should be in my favour rather than in favour of the Crown as I am appealing here on a question of liberty. Still, as between the Queen and British subjects the dominion exercised is in the nature of sovereignty. The dominion exercised in foreign countries under the Foreign Jurisdiction Act is a sovereign power. That may be quite sufficient for the purpose of the trial.

THE LORD CHANCELLOR:- We cannot appreciate that without knowing how the indictment made that material. What was the indictment? That Act is against British subjects anywhere if they organise any military expedition against a country in amity with this country.

MR. RAWLINSON:- That was the point argued by Sir Edward Clarke in the case and that is the reason why Lord Russell has left it in this form. He said if it became necessary. The point they went on was taking the other view of the law to be right, namely that the offence had to be within Her Majesty's dominions.

THE LORD CHANCELLOR:- That is why I want to know. Did the indictment make it material that what they did should be within the dominion? It is very odd it should have raised that issue.

MR. RAWLINSON:- That issue was raised.

THE LORD CHANCELLOR:- Have you the indictment here?

MR. RAWLINSON:- I think I have extracts from it. My friend, Mr. Lyttelton, was for the defence there and I was for the prosecution and the whole argument turned on that point--I can say that the whole argument of Mr. Lyttelton and Sir Edward Clarke, who led him, turned on that point and we controverted it.

THE LORD CHANCELLOR:- "If any person without the license of Her Majesty being a British subject within or without Her Majesty's dominions"--and then it goes on with the words creating the offence.

MR. RAWLINSON:- Is that Section 7?

THE LORD CHANCELLOR:- No, Section2. Do the words "within or without" and the words "a British subject" run throughout the whole act?

MR. RAWLINSON:- No.

THE LORD CHANCELLOR:- That is what I cannot make out.

SIR RICHARD COUCH:- Was there any explanation of what the Jury were to understand by dominion?

MR. RAWLINSON:- Yes. That is what I am using as my argument. It was very fully gone into by the Lord Chief Justice having been very fully argued. It was under the section as to organising an expedition.

THE LORD CHANCELLOR:- I should think it was Section 11. I suppose there were counts treating it on both hypotheses making it essential to prove they were British subjects and counts treating it as within Her Majesty's dominions and therefore against the latter part of the statute.

MR. RAWLINSON:- Your Lordships may take it from me that it was a long indictment and in some of our counts it was made the point

that within the dominions became material. It was argued supposing the whole thing happened at Boulogne and the people had never been near England would that have been within the purview of the Act. That was argued by Sir Edward Clarke and there was some difficulty felt about it and it became material on certain counts in the indictment.

THE LORD CHANCELLOR:- What became of it? Was there judgment against the Defendants pronounced on the conviction that this was done within the dominions of Her Majesty?

MR. RAWLINSON:- They were convicted on that count.

THE LORD CHANCELLOR:- They might have been convicted on it. Were they convicted on the other?

MR. RAWLINSON:- Certainly the distinction was taken.

THE LORD CHANCELLOR:- If there was a good conviction on the other counts it would be only a question of pronouncing judgment on each in terms.

MR. RAWLINSON:- I think it was done with some care if I might take it very briefly. It was done by the Lord Chief Justice with great consideration and care.

THE LORD CHANCELLOR:- It did not become material in this sense, if there were good counts found by the Jury which avoided that question.

MR. RAWLINSON:- At that time no one knew. I think they would have knocked out a lot of the counts if they could have knocked off "within the dominions".

THE LORD CHANCELLOR:- I understand they were convicted on all the counts.

MR. RAWLINSON:- They were finally, but first the point taken by Sir Edward Clarke was that the indictment was bad when they were called upon to plead.

THE LORD CHANCELLOR:- How was the indictment bad?

MR. RAWLINSON:- It was argued at considerable length and there did arise incidentally not in the same way as afterwards the question of whether within Her Majesty's dominion was a necessary part of the counts or not.

THE LORD CHANCELLOR:- How could that be on the face of the Statute itself.

MR. RAWLINSON:- That was decided against him. Of course, the point was taken whether there were certain things on the face of the indictment. It was gone into incidentally in the argument, and gone into thoroughly in the main argument before the Court.

THE LORD CHANCELLOR:- Do you mean the indictment was demurred to?

MR. RAWLINSON:- Yes. The point was taken that it was bad in substance before the plea was taken. Upon the point I am dealing with which was the question of his Lordship's remarks upon the Charter, he says this:- "They are authorised to hold, use and retain for the purposes of the Company and on the terms of the Charter, the full benefit of the concessions and agreements

which have been made. They are further authorised and empowered subject to the approval of the Secretary of State, to acquire further grants, and so forth."

THE LORD CHANCELLOR:- They are to acquire, you observe. The whole hypothesis of a Charter of that sort is that Her Majesty incorporates the new legal creature for the purpose of going to some foreign country and assuming they will get that land from the foreign country. It does not assume to give it them.

MR. RAWLINSON:- Then the next sentence is this:- "It is stipulated that no powers or government or administration shall be exercised under or in relation to any such last mentioned concessions or agreement grant or treaty"--that is the form-- "without the approval of the Queen."

THE LORD CHANCELLOR:- That is to say from the Foreign Sovereign. That must be implied in it.

MR. RAWLINSON:- The Company is to remain British in character.

THE LORD CHANCELLOR:- That is to say, the new incorporated creature is to be a British subject.

MR. RAWLINSON:- The argument I am going to put is that having to put the British Company--the new incorporated creature-- there, by the exercise of dominion over that Company, by the exclusively British nature of the Company, by the fact that British soldiers have fought for the particular territory under the Charter, all those acts shew that Her Majesty has retained it within Her Dominions certainly before 1896.

THE LORD CHANCELLOR:- That comes to the principle of law entering into the whole history of this law. Have you ever heard of sovereignty being insisted upon by reason of such a grant? It is new to me that such a thing was ever heard of.

MR. RAWLINSON:- I ask you to look at the terms of the grant.

THE LORD CHANCELLOR:- The terms of the grant cannot do what you assume it can do, namely give jurisdiction of sovereignty over a place Her Majesty has no authority in.

MR. RAWLINSON:- In a sense it is difficult to say She had authority there.

THE LORD CHANCELLOR:- It assumes the new creature can get some land and employ itself there.

MR. RAWLINSON:- Has got.

THE LORD CHANCELLOR:- It may be a very profitable thing for more reasons than one. I do not know how many there are in South Africa at this moment and West Africa and a variety of places but I have never heard it suggested yet that that carried Her Majesty's sovereignty there.

MR. RAWLINSON:- No, my Lord, unless it is recognised and I am submitting that is one of the first steps of a recognition.

THE LORD CHANCELLOR:- It appears to me, if your argument is worth anything, it comes to this. These Orders in Council are issued in pursuance of the Foreign Jurisdiction Act, and though they purport to deal with a Foreign Country--and that is the whole hypothesis of the Act and the foundation of your argument--

yet all the Acts that are done there ultimately become sovereignties.

MR. RAWLINSON:- That would be possibly so.

THE LORD CHANCELLOR:- That is a very odd state of things. Then there is no foreign country in which this Act can operate because the moment you establish the Courts there and a High Commissioner there, it becomes Her Majesty's.

MR. RAWLINSON:- Your Lordship would have to go further than that. I must take it by steps. I do say a time comes when it ceases to be a foreign country. That time has come long ago in this case.

THE LORD CHANCELLOR:- November, 1898, was not it?

MR. RAWLINSON:- Yes, that is the date of this Order.

THE LORD CHANCELLOR:- We are only in January, 1899, at present.

MR. RAWLINSON:- Certainly, but in July, 1896, eighteen months before it clearly had come.

THE LORD CHANCELLOR:- We will not split straws about it. Her Majesty has never recognised it as possible.

MR. RAWLINSON:- I will take it as briefly as I can but I think I ought to call attention to one or other Proclamations. That is the Charter which I submit does begin the steps of bringing it within Her Majesty's dominion even if it is not conclusive. There are other documents but I do not know that I can usefully trouble your Lordship with the exact details.

THE LORD CHANCELLOR:- So far as such things can give you your proposition I should have thought you could have nothing stronger than the persons purporting to act there to try people for offences, and even sentence them to death and with the permission of the High Commissioner to execute them. If those things under the circumstances are capable of giving sovereignty I should think you would have as strong a case of sovereignty as could be well established. You do not require proclamations if that is true. If your main proposition is true you have every act of sovereignty a person can exercise.

MR. RAWLINSON:- That does save me a great deal of what I have to say. There is, as your Lordship says, a large bulk of evidence of that kind, documentary and otherwise, which is summed up in these few words and which sums up what I have said:- "I have read to you with tedious minuteness what the Queen in fact did, and the next question you will have to ask yourselves is: what remained for Her to do to show the assumption by Her of authority in the nature of sovereignty, and to show that she was treating for all practical purposes this district in which Pitsani Potlugo was situate as part of Her dominions for all effective purposes. Doing what she did legislating either directly by Order in Council, or through the medium of Proclamation by Her authorised Governor or representative, what remained in the way of sovereign authority and dominion for anyone else to do." If I might use it as my argument--I cannot put it higher than that--I begin by reading the Charter and there is a mass of other documents which I cannot carry further than what your Lordship puts namely continuous acts of dominion and jurisdiction in this particular country. I cannot put it higher than that but having got as far as that I sum it up in these words and say that those actions are an assumption of dominion. That the district was treated as part of Her Majesty's

dominions for all effective purposes and that these words spoken in 1896 are correct and were referring to a past state of affairs then and therefore before 1896, with reference to these different acts of sovereignty, clearly by that time, if not before this, had come within Her Majesty's dominions and was so considered in this particular case.

The other matter is this, if I might leave the rest of the case. Mr Lord goes on:- "I am really arguing this case with you, gentlemen, with the same method and modes with which I have endeavoured to arrive for myself at the conclusion at what is a right view in this matter." It is the same question of opinion. "It is undoubtedly true as the learned counsel has with insistence--proper insistence--pointed out that there is language in relation to the districts outside British Bechuanaland which points to something different from dominion, something different from sovereignty, and that there is, in fact, no express cession in the treaty with Montxoma, and nothing in that treaty purports to be the cession of territory. That is quite true. And finally, more than once in these documents, it is pointed out that the district in which Pitsani Potlugo is situate is within what is described as the British Protectorate. Upon that point which is perhaps the most forcible point in relation to this matter, namely, its description as a Protectorate, as distinguished from territorial dominion and sovereign possession and power, I have to say a word or two. We have to consider whether we must not see what the thing was, rather than what the thing was called. Now, Protectorates vary infinitely. There are many instances of very ancient Protectorates which amounted to no more than this: that a powerful state said to the World: this State which adjoins me, or in whose welfare I am interested, is under my wing, which meant if you attacked that protected state you attack me. But that Protectorate left to the protected State, untouched and uninterfered with, its complete and absolute internal autonomy and powers of government. Again, a common feature in these Protectorates--the most common feature in them--is the prohibition of the so-called protected state from entering into treaties with other States without the authority of the protecting State which is the case of the relation of the Empire of Great Britain of the Queen and the government of the South African Republic. It is bound by certain specific and defined expressions not to enter treaties with other States without the assent of the Queen, but in all else its complete independence, its autonomy is in no way interfered with or controlled. But is this anything like those? You cannot refer--we have not the materials before us--the story is too recent perhaps to justify us in referring to it as a notorious historical record, but we know enough of the dealings in this case with the territories of South Africa to know that the Protectorates in South Africa and this Protectorate--if it is to be described by that name--differ essentially from all those to which I have been adverting and the question is whether by whatever name it is called it does not become the exercise and assumption by the representative of the Crown of sovereign dominion and sovereign authority in that particular territory. That it is exclusive one can hardly doubt. What remained for Montsioia, the Chief of this district in which Pitsani Potlugo was situated, to do." That would apply to Lobengula in this particular case. "What rights were left to him? I mean the nature of authority. Apparently none so far as the history of this case of the establishment in Pitsani Potlugo of a camp, for the use of the Chartered Company who held their authority from the Crown to be there--except for that solitary instance we have none at all. But if these considerations be of weight in general in any case of a Protectorate you must ask yourselves whether they have not special weight when dealing with the meaning of 'dominion'.

used in an Act of this nature. Recollect what the nature of this Act was. Its purpose was to prevent the territories under the dominion and authority of the Queen being used as the place in which there shall be prepared expeditions military or naval to proceed against a friendly state. Now who had dominion? Who had authority in this place, Pitsani Potlugo, which was part of the territory of the Baralongs? Who had authority except the Queen, and the representatives of the Queen? Let me illustrate what I mean." Then he proceeds to give an example.

THE LORD CHANCELLOR:- That seems to give a very artificial meaning to the word "dominion". A meaning which is to be applicable to the Foreign Enlistment Act and not to its ordinary meaning. That might be right enough--I do not say. I am not satisfied that that is right but that is a different thing to what you are contending.

MR. RAWLINSON:- Yes. I am trying to carry it higher than that if I can. I need not trouble your Lordships with the illustration which is given but he goes on "therefore we propose to ask you because the answer to the question depends not entirely upon the construction of the documents to which I have referred but depends in part on what was done under those documents, the single question in relation to this district where Pitsani Potlugo is situate: did the Queen by Her representatives in fact exercise sovereign rights of dominion in that district? I do not know that I can usefully carry it further than that as far as this summing up is concerned. The arguments which are of great length on the point and are of great interest, I do not think would carry it further for my purpose than the summing up of the Lord Chief Justice, but what I say is this that the word 'dominion' is itself the same and I should submit to your Lordships that there is no reason why a different construction should be put upon it in the Foreign Enlistment Act."

THE LORD CHANCELLOR:- At present I am rather disposed to agree with you. The Lord Chief Justice does not think so. He says in terms you must consider what this is and remember that this is the Foreign Enlistment Act, and that the construction you are to put on the words is with reference to the Foreign Enlistment Act. Obviously he is endeavouring to some distinction between what the ordinary and normal meaning of the word is and the meaning which is to be attached to it in the Foreign Enlistment Act. I do not say he is right.

MR. RAWLINSON:- If I cannot use his conclusion may I use his arguments and say what more was there to be done in the way of dominion if there was not dominion.

THE LORD CHANCELLOR:- I should have thought the answer was very obvious. When you are dealing with the dominion of a sovereign you must take whatever you call it, the Queen or the President or the particular country with which you are dealing, and they must adopt it as their own. I never yet heard of sovereignty being forced on a country without its assent and Her Majesty certainly has not purported to do so.

MR. RAWLINSON:- I feel the weight of that. I submit it really is a question from a constitutional point of view whether as a matter of fact it has become within Her Majesty's dominions and the Queen has acted as if it were within Her dominions.

THE LORD CHANCELLOR:- Try another region of enquiry. One mode of acquiring territory is by settlement. Can anybody go and settle in a country and against the will of a particular Sovereign make it part of the country of that Sovereign?

MR. RAWLINSON:- No, but I should have submitted there was a

time when the Sovereign by act--not necessarily by a written act--made it part of the dominion of the Sovereign.

THE LORD CHANCELLOR:- Unless you have the assent of the Sovereign of the country, is there any authority at all for saying that a country becomes the property of and within the sovereignty of another country without the constitutional acquiescence of that country on its being made part of it.

MR. RAWLINSON:- I think without acquiescence I cannot put it, but constitutionally I should submit you could assume that from the act of the Sovereign government.

THE LORD CHANCELLOR:- That cannot do for you here because here is the express distinction between those territories and those of Her Majesty.

MR. RAWLINSON:- By Order in Council.

THE LORD CHANCELLOR:- Not only by Order in Council but by the Foreign Jurisdiction Act itself.

MR. RAWLINSON:- I should have submitted that long before this Order was made the Foreign Jurisdiction Act had ceased to apply. That the country at large had done everything it could to act as sovereign in the country and had exercised power over it and made it part of Her Majesty's dominions at large. Once that has occurred the extraordinary power given to the Queen in Council has gone.

THE LORD CHANCELLOR:- You know what I asked you for? I have listened with great care to your able argument but what I asked you for was an authority for that proposition.

MR. RAWLINSON:- With submission I was assenting to your Lordship's proposition. I say that assent is necessary but you may assume it from the facts.

THE LORD CHANCELLOR:- That is what I ask for authority for.

MR. RAWLINSON:- I did not understand your Lordship asked for authority for that.

THE LORD CHANCELLOR:- Any writer on international law or any case decided. To me it is an absolute novelty.

MR. RAWLINSON:- I am afraid I cannot give the authority but I should have hoped to be able to give the authority of cases whose settlers had taken possession of a country and after a time it had been recognised.

THE LORD CHANCELLOR:- Introduce the words "been recognised" and I agree. The moment you have possession by Acts and recognition by the Sovereign, then you have it. This is without it and against the will of the Sovereign.

MR. RAWLINSON:- What I am asking your Lordship to say is that by acts the sovereign has consented to by that document which I am contending against at the present moment a different statement is made.

LORD DAVEY:- Must not you interpret the acts according to the solemn statement?

MR. RAWLINSON:- I admit the solemn written statement is a matter I have to get over but I do submit here--and I have read the part that helps me most--that having regard to the strong expression in the argument I have used as my argument

by the Lord Chief Justice it is shown here that dominion has undoubtedly been exercised by the Crown of Great Britain generally and that that being so at the time that was done, the power to make that document was gone because dominion had accrued considerably before November, 1898, and the country had come within the dominion of Her Majesty for every conceivable purpose. That Bulawayo was within the British dominion and that being so, the power to make that Order in Council had gone.

Then, my Lord, the only point I have to reiterate is this, namely, that assuming for the moment for the purpose of argument as I am assuming that the right originally existed there is nothing here that has taken it away that the Foreign Enlistment Act applies expressly in Section 12 to prevent it applying in the way described. Then, the further point I take--and I do not propose to weary your Lordships further with it--is the question that the Foreign Jurisdiction Act owing to certain acts can no longer be held to apply. Assuming it can be done, I say the Order in Council had not power to take away the right of trial by jury. The first point I take is that on the proper reading of that Order in Council it does not take away that right and if there is any question of deeper consideration on which your Lordships think I ought to have brought authorities before you, for instance the question of the applicability of Cape Law as a matter of fact to Bulawayo or Matabeleland generally I do hope your Lordships will allow me the opportunity of bringing those questions of fact before you because it has been impossible to get more than I have got, but as far as that is concerned I hope your Lordships will grant us leave to appeal and if you have doubts on any point such as that you will allow us the opportunity to get together further facts to lay before your Lordships on that point.

Counsel and parties are directed to withdraw and their Lordships deliberate. After a short time Counsel and parties are re-admitted.

The judgment of their Lordships was given by:

THE LORD CHANCELLOR:- "Their Lordships will humbly advise Her Majesty that on this petition no leave to appeal shall be given. Their Lordships will at a later period give their reasons in respect of some of the matters that have been argued before them, which require more careful treatment. At present their Lordships will only advise that leave be not given to appeal."

It does not appear that a formal statement of their Lordships' reasons was ever publicly given. Nevertheless, the Privy Council records contain what purports to be a copy or draft of a letter to be sent by the Registrar of the Privy Council on March 25, 1901, to Messrs. Hutchison and Sons, Solicitors (who acted for the appellant) as follows: '...I am desired by the Lords of the Judicial Committee to say that, as it has been intimated to them that their reasons for advising Her late Majesty to dismiss the Petition (as was done by Order in Council of 2nd February, 1899) were not in all points sufficiently explained by what fell from the Board during the argument, they have prepared a memorandum on the grounds of their Report. [Paragraph] I have to add that their Lordships do not propose to make any public statement but, should you be desirous of seeing this memorandum, I am authorised to supply you with a copy on application to this Office.' A letter from the Solicitors, dated March 27, 1901, and mentioning frequent requests for reasons from the profession in Bulawayo, duly asks for a copy; this letter is endorsed 'Copy sent with the compliments of the Registrar of the Privy Council 1 Ap. 01', and it would therefore appear that the printed Memorandum contained in the Privy Council records, which is here reproduced, is an official statement of the reasons of the Board, published with their authority at least to the petitioner and to anyone approaching his Solicitors whom the latter might subsequently have seen fit to oblige with the information.

This Memorandum is as follows:

[M E M O R A N D U M]

Confidential

STAPLES v. THE QUEEN

SUGGESTIONS BY LORD HOBHOUSE

for a Statement of the Grounds of Report to the Queen, dated 27th January, 1899.

1. In December, 1898, the Petitioner Staples was tried on a charge of theft in the High Court of Matabeleland, was convicted, and sentenced to imprisonment. The prisoner demanded a trial by jury; but he was tried by a Court composed of one Judge, Mr. Justice Vintcent, and four assessors called in by him. He then petitioned Her Majesty for leave to appeal, on the ground that he could not lawfully be tried except by Judge and Jury. After hearing arguments on his behalf their Lordships advised Her Majesty to dismiss the petition, as was done by order dated 2nd February, 1899. As

it has been intimated to their Lordships that their reasons for giving this advice were not in all points sufficiently explained by what fell from them during the argument, they have authorised the Registrar to make the statement following.

2. The High Court acted under the Matabeleland Order in Council made by virtue of the powers conferred on the Crown by the Foreign Jurisdiction Act, 53 & 54 Vict. cap. 37. A subsequent order for Southern Rhodesia was discussed both in the Court below and at this Bar; but it had not come into operation when the prisoner was tried. As regards the right claimed by the prisoner, it would make no difference which of the two orders was in force.

3. The order of 1894 established the Court of Matabeleland with full criminal jurisdiction, to be exercised, until other arrangements are made by proclamation, by any Judge sitting alone. A subsequent proclamation empowered the Court to call in assessors. The order is quite clear, and there was no dispute as to its construction; but objections were taken to its validity.

4. Section 12 of the Foreign Jurisdiction Act is in the following terms:-

> "(1) If any Order in Council made in pursuance of this Act as respects any foreign country is in any respect repugnant to the provisions of any Act of Parliament extending to Her Majesty's subjects in that country, or repugnant to any order or regulation made under the authority of any such Act of Parliament, or having in that country the force or effect of any such Act, it shall be read subject to that Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be void.
>
> "(2) An Order in Council made in pursuance of this Act shall not be, or be deemed to have been, void on the ground of repugnancy to the law of England unless it is repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid."

5. For the prisoner it was argued that the right to be tried by jury was conferred on him by Magna Charta; that he carried it with him to Matabeleland; and that it is repugnant to Magna Charta to order that he should be tried without a jury. The point was earnestly pressed in the Court below, and Mr. Justice Vintcent bestowed some pains in considering what would be the law following immigrants from Cape Colony into Matabeleland. Their Lordships did not find it necessary to travel into these matters, because it seemed to them that the repugnancy contemplated by the Foreign Jurisdiction Act must mean repugnancy to a statute or order applied in some special way to British subjects in the foreign country in question. It would be a most unreasonable limit on the Crown's power of introducing laws fitting to the circumstances of its subjects in a foreign country if it were made impossible to modify any Act of Parliament which prior to the Order in Council might be invoked as applicable to a British subject.

6. Then it was contended that Matabeleland is not foreign territory, but British, for which proposition reliance is placed on the ruling of the learned judges who tried the case of the Queen v. Jameson and Others. Their Lordships are not called on to review that decision. Whether it can or cannot be maintained as a sound exposition of the Foreign Enlistment Act, that Act is different from the Foreign Jurisdiction Act in purpose and in language. In Reg. v. Jameson the question put

by the Court to the jury, and answered in the affirmative, was to this effect: Whether the Queen did in fact exercise dominion and sovereignty within the country of the Baralongs? The minds of the jury were prepared for that question by the charge of the Lord Chief Justice, laying before them the position of the Baralong country and the regulative powers of the Queen within it. There was not throughout the case any suggestion that the Baralong country had become British territory.

7. Now the language of the Foreign Jurisdiction Act is addressed to the very purpose of distinguishing between countries whose territory is vested in the Queen and other countries where she has jurisdiction without territory; and to provide for the establishment of law in the latter class of country. In the leading section (Sec. 1) the jurisdiction which Her Majesty has in a "foreign country" is to be exercised "as if she had acquired that jurisdiction by the cession or conquest of territory." A "foreign country" then is opposed to one whose territory has been ceded or conquered. If there has been no such cession or conquest Her Majesty may have powers of governing in a country (and no distinctions are taken as to the amount of such powers) and yet the country remains a "foreign country" for many purposes, and among them the purposes of the Foreign Jurisdiction Act. In the preamble, which refers to every kind of jurisdiction exercised beyond British territory, a wider expression than foreign territory is used, viz. "out of Her Majesty's dominions," because there are provisions relating to protected persons, and to tracts of sea where there is neither territory nor acquired jurisdiction.

8. The situation is a very familiar one to Indian lawyers and administrators. For in India there are hundreds of States in which the East India Company during its rule, and afterwards the Crown, had acquired large powers of administration; in some so large that the Native Ruler has a very limited range of sovereign power left to him. And yet, unless there has been cession of territory, the least independent of such States is for some important purposes a Foreign State; its subjects are not British subjects; the laws passed by the Indian Legislature do not affect them; and it is subject to such rules as have been duly made in accordance with the jurisdiction acquired over it. Their Lordships were clear that Matabeleland was in such a position and was rightly treated as falling within the provisions of the Foreign Jurisdiction Act.

APPENDIX TWO

In The
SUPERIOR COURT OF THE PROVINCE OF QUEBEC

Before: The Hon. Mr. Justice Léon Casgrain
District of Quebec, No. 138-195. Fiat and Writ of Summons bearing date March 15, 1965; Petition for Interlocutory Injunction of same date; Hearing on March 23, 1965; Judgment dismissing Petition, May 3, 1965.

Between

JOSEPH PAUL YVES GABIAS, Advocate, One of Her Majesty's Counsel learned in the Law, Member representing the electoral district of Three Rivers in the Legislative Assembly of the Province of Quebec, domiciled in the City and District of Three Rivers,

PLAINTIFF

and

THE LEGISLATIVE ASSEMBLY OF THE PROVINCE OF QUEBEC, a body politic legally constituted by the British North America Act, 1867, section 71, having its* seat in the City of Quebec, District of Quebec,

DEFENDANT

and

THE ATTORNEY GENERAL OF THE PROVINCE OF QUEBEC; representing Her Majesty in right of the Province.

A member of the Quebec Legislative Assembly was by resolution ordered to be excluded for the period of three years, and in a subsequent session of the Legislature it was resolved that the former resolution should continue to have effect in the new session. This sanction was imposed in consequence of the Member allegedly having made himself guilty of a breach of privilege in having precipitately adopted, as his own, charges later held by the Committee of Privileges to be without foundation, directed against another Member who was Attorney-General

*The word 'social' or 'corporate' was deleted by Plaintiff before service of the proceedings, from the place where it appeared with the word 'seat' in the designation of the Defendant in the Fiat for a Writ of Summons. All the proceedings are drawn in the French language; as designated by Plaintiff, the defendant was 'L'Assemblée Législative de la Province de Québec, corps politique légalement constitué par l'Acte de l'Amérique du Nord Britannique, 1867, article 71, ayant son siège [social is deleted] en la cité de Québec, district de Québec.'

of the Province, of corruption, made by a third person who claimed to have given the latter a bribe.

By action directed against the Legislative Assembly, designated in the proceedings as a body politic, Plaintiff, the suspended or excluded Member, sought to have the resolutions of the Assembly excluding him annulled and declared null; and by petition for an interlocutory injunction directed against the same defendant, its Speaker, Members, officers, and servants, Plaintiff sought to enjoin the latter from giving any effect to the resolutions and interfering with the exercise of his rights and privileges as Member.

Held, by the Superior Court (Casgrain, J.) on the proceedings by way of petition:

(i) The Legislative Assembly was a legislative body which thus had no legal personality distinct from that of each of the members which composed it; accordingly, it could not be sued as such.

(ii) The Legislative Assembly was not subject to the control of the Superior Court in respect of its proceedings; and the Court had no jurisdiction to order it to cease proceedings, decisions, and acts preventing Plaintiff from sitting; even supposing the proceedings had been properly instituted.

(iii) The Petition must be dismissed.

ACTION against the Legislative Assembly of Quebec to obtain a declaration of the nullity, and an annulment, of two resolutions of the Legislative Assembly; of which the first ordered the exclusion of Plaintiff, a member of that body, from the Assembly for a period of three years; and of which the second ordered that the first-mentioned resolution should continue to have effect in a new Session of the Quebec Legislature then in progress; and PETITION FOR AN INTERLOCUTORY INJUNCTION to restrain the defendant Assembly, its Speaker, Chairman of Committees, Members, Clerk, Sergeant-at-Arms, officers, employees, doorkeepers and servants from preventing Plaintiff, by way of consequence or effect of the foregoing resolutions, from entering the Assembly Chamber and sitting therein and speaking therein, or from the exercise of his other immunities or privileges as Member.

On a fiat dated March 15, 1965, the Plaintiff, appearing personally, obtained a writ of summons directed only against the Legislative Assembly of Quebec, as defendant, described and designated as above set forth. Attached to the said writ was a declaration which set out the following: plaintiff's return as Member of the Legislative Assembly of Quebec at the general elections of November 14, 1962; his taking and subscribing the oath of allegiance and taking his seat; the opening by the Lieutenant-Governor of the Third Session of the Twenty-Seventh Legislature on January 14, 1964; Plaintiff's regular attendance at the Assembly in the place assigned by the Sergeant-at-Arms; his continued possession of all legal qualifications; his exclusion from the Assembly, on motion of Mr. Lesage [the Premier], seconded by Mr. Gérin-Lajoie [the Minister of Education], on division, by a vote of 53 in favour and 23 against, as appeared from the Journals of the Legislative Assembly of Quebec for July 29, 1964; the prorogation of the Legislature on the 31st

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. The relevant extract, at pp.732-3, reads as follows [the

day of July, 1964; provisions of the Rules and Standing Orders of the Legislative Assembly prescribing that the closing of a session operates to vacate all orders not fully executed;[2] the commencement of the Fourth Session of the Twenty-Seventh Legislature on January 21, 1965; the taking of his seat by Plaintiff on that day and the days following; the breach by plaintiff of no privilege, within the aforesaid Rules, during such session; plaintiff's compliance with the Legislature Act; the continuance in force without suspension, amendment, or repeal, of the above-mentioned provision of the aforesaid Rules; the proposal by Mr. Laporte [Leader of the Government in the House] in the Legislative Assembly, on January 26th, 1965, of a motion providing that the resolution which had been adopted by the House on July 29, 1964, do continue to have effect during the [then] present session;[3] the adoption of the motion on January 27,1965,or

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English version only being here reproduced]:

Mr. Lesage moved, seconded by Mr. Gérin-Lajoie:

That the member for Three-Rivers be declared guilty of a breach of privilege for having brought against the member for Saint-Maurice a charge of corruption which he did not prove and the falsity of which was established and recognized;

That in view of the gravity of this outrage, the member for Three-Rivers be excluded for a period of three years.

And the Question being put on the motion, the House divided, and the names being called for, they were taken down as follows:

YEAS:--MM.--Messrs. Arsenault, Beaupré, Bédard, Bertrand (Terrebonne), Binette, Boulais, Brisson, Brown, Cadieux, Cliche, Coiteux (L'Assomption), Collard, Couturier, Crépeau, Dallaire, Dionne, Dupré, Fortier, Fortin, Fournier, Gérin-Lajoie, Godbout, Hanley, Harvey, Hébert, Kierans, Mme.--Mrs. Kirkland-Casgrain, MM.--Messrs. Kennedy, Lacroix, Lafrance, Lalonde, Lapalme, Laporte, Lavoie (Laval), LeChasseur, Lesage, Lévesque (Bonaventure), Lévesque (Montréal-Laurier), Maheux, Mailloux, Martin, McGuire, Meunier, Morissette, Ouimet, O'Rielly, Parent, Pinard, Roy, Saint-Pierre, Théberge, Turpin, Vaillancourt.--53.

NAYS:--MM. Messrs. Allard, Bellemare, Bernatchez, Bertrand (Missisquoi), Boudreau, Charbonneau, Dozois, Ducharme, Elie, Gagnon, Gauthier, Gervais, Gosselin, Guillemette, Johnson, Johnston, Lafontaine, Lizotte, Loubier, Majeau, Raymond, Russell, Somerville.--23.

So it was resolved in the Affirmative.
The motion was accordingly adopted.

2. Règlement annoté de l'Assemblée législative, by Louis-Philippe Geoffrion, Clerk, published under the direction of the Hon. Bernard Bissonnette, Speaker of the Legislative Assembly (Quebec, 1941). Art. 10 of the English version reads as follows, '10.--1. The closing of any session shall dissolve all committees appointed by the house, vacate all orders not fully executed, put an end especially to the imprisonment of any person taken in charge by order of the house, and terminate every proceeding pending and every bill not assented to or reserved by the Lieutenant-Governor.'

'2. It shall not, however, have the effect of nullifying any order to print a document, or any order or address of the house for returns or papers.'

division, by 58 votes to 21, by the Assembly.[4]

Plaintiff in his declaration furthermore claimed that the resolutions were unconstitutional, ultra vires, null, irregular, illegal, of no existence, and without effect, and that they constituted an abuse of right and of power in that they infringed: first, the British North America Act, 1867; second, the privileges and immunities of a member elected to the Legislative Assembly, under the Legislature Act, R.S.Q. 1941 c.4 [now R.S.Q. 1964, c.6] as amended; and third, the Annotated Rules; and particularly that the defendant Assembly had exceeded its rights and privileges and committed an abuse of right and of power such as to vitiate and affect with nullity the aforesaid resolutions, by adopting them by a majority vote; that the said resolutions so adopted violated the rights of plaintiff and the electors of the constituency of Three Rivers; and that the action in annullment was well founded in fact and in law.

Plaintiff accordingly sought by way of relief that the Court declare unconstitutional, ultra vires, illegal, without effect, and non-existent, and that it annul, the resolutions of July 29, 1964 and of January 27, 1965; the whole with costs against the defendant, the Legislative Assembly of the Province of Quebec.

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3. Journals of the Legislative Assembly of Quebec, 4th Sess., 27th Legis., January 26th, 1965, at pp.32-3, 'That the resolution adopted by this House on July 29th, 1964, in the following terms [here quoting the earlier resolution, supra, note 2] do continue to have effect during the present session!

For the question whether Plaintiff should withdraw during debate on the motion, determined in the affirmative on division 55-24, sustaining the Speaker's ruling, see ibid., pp.32-3.

4. Journals of the Legislative Assembly of Quebec, January 27, 1965, p.39:

The House, according to Order, resumed the debate on the motion by Mr. Laporte proposing:

That the resolution adopted by this House on July 29th 1964, in the following terms:

"That the member for Three-Rivers be declared guilty of a breach of privilege for having brought against the member for Saint-Maurice a charge of corruption which he did not prove and the falsity of which was established and recognized;

That in view of the gravity of this outrage, the member for Three-Rivers be excluded for a period of three years.",

do continue to have effect during the present session.

And the Question being put on the motion, the House divided, and the names being called for, they were taken down as follows:

YEAS:--MM.--Messrs. Arsenault, Baillargeon, Beaupré, Bédard, Bernier, Binette, Blank, Boulais, Brisson, Brown,

By certificate of service endorsed on the writ of summons, J. Roland Gagnon, Bailiff of the Superior Court, declared that he had served the said proceedings, on March 16, 1965, upon the Legislative Assembly of the Province of Quebec, defendant, Hotel du Gouvernement, Quebec, speaking to the Speaker of the House, Mr. Richard Hyde.

By Petition for a Writ of interlocutory injunction bearing date March 15, 1965, Plaintiff repeated and elaborated upon the allegations above set out. He referred to, and referentially incorporated into the petition, the charges made by him in the Assembly on June 30, 1964, against the Hon. René Hamel, Member for St.-Maurice, as recorded in the Journals for that date[5] and

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Cadieux, Cliche, Coiteux (Duplessis), Coiteux (L'Assomption), Collard, Courcy, Cournoyer, Couturier, Dallaire, Dupré, Fortier, Fortin, Fournier, Gérin-Lajoie, Godbout, Hamel, Hanley, Hardy, Harvey, Hébert, Kierans, Mme-Mrs. Kirkland-Casgrain, MM.--Messrs. Kennedy, Lacroix, Lafrance, Lalonde, Laporte, Laroche, Lavoie (Laval), LeChasseur, Lévesque (Bonaventure), Lévesque (Montréal-Laurier), Maheux, Mailloux, Maltais, Martin, McGuire, Meunier, Morissette, O'Farrell, Parent, Roy, Saint-Pierre, Théberge, Trépanier, Turpin, Vaillancourt, Wagner.--58.

NAYS:--MM.--Messrs. Allard, Bellemare, Bertrand, Boudreau, Charbonneau, Cloutier, Cottingham, Dozois, Elie, Gagnon, Gauthier, Gervais, Gosselin, Johnston, Lavoie (Wolfe), Lizotte, Loubier, Majeau, Raymond, Russell, Somerville.--21.

So it was resolved in the affirmative.
The motion was accordingly adopted.

Mr. Lesage stated that he had not voted because of the absence of the Leader of the Opposition, but that had he voted, he would have voted in fovour of the motion.

5. Journals of the Legislative Assembly of Quebec, June 30, 1964, p. 591. Mr. Gabias stated:

STATEMENT

I, the undersigned, Yves Gabias, member of the Quebec Legislative Assembly for the county of Three-Rivers wish to accuse the member for the county of Saint-Maurice of an act which renders him unworthy to sit in this House.

During the month of July or August 1960, the member for Saint-Maurice, at the time that he had been declared elected as member for that county, received the sum of $1,500.00, in the form of fifteen (15) one hundred dollar bills, from Mr. Amédée Bellemare, aged 45, a contractor living in Shawinigan East, in the Province of Quebec.

In consideration of this sum of $1,500.00, the member for Saint-Maurice gave, or caused to be given a contract in the amount of $4,200.00, to the said Amédée Bellemare, the said contract being made between Amédée Bellemare and Patrick Bellemare, on the one hand, and Samson & Marchand, Inc., on the other hand, under which contract signed at Sainte-Flore, Saint-Maurice county, the said Amédée Bellemare would provide the 1" gravel, the loading and crushing thereof, at a price of $0.50 per ton, laid. The 3" gravel to be supplied and laid at a cost of $0.43 per ton.

which had, plaintiff declared, been made in accordance with the annotated Rules of the Legislative Assembly.[6] On July 8, 1964, the House had resolved to proceed to an investigation to determine whether the accusation was well-founded, and had further

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This concerned a contract awarded by the provincial Department of Roads for work on Boulevard Saint-Onge.

The said sum of $1,500.00 was given by Amédée Bellemare to the member for Saint-Maurice, in his office, in the Department of Labour, around three o'clock in the afternoon. After the sum of $1,500.00 had been given to the member for Saint-Maurice, the latter immediately put the 15 one hundred dollar bills in the right hand pocket of his suit coat and said to Mr. Amédée Bellemare: "Thank you, you're a very smart man."

I am assuming the responsibility for the present accusation and I am giving immediate notice to this House that I will propose that it proceed with an inquiry to establish if the accusation is well founded.

In accordance with the Rules and Standing Orders of the Legislative Assembly.

Quebec, June 30th, 1964.

(signed) Yves Gabias, Q.C.
Member for Three-Rivers.

6. Rule 196, in the English and French versions, reads as follows [emphasis added]:

196. - 1. Whenever a member desires to charge one of his colleagues with one act or more disqualifying him from sitting in the house, he shall at first read, from his seat, a declaration setting forth the charge in direct, clear and moderate terms, and in which he shall take the responsibility of the charge made, and then give forthwith notice of a motion that the house do proceed to investigate the truth of the charge. Debates, H. of C. of Canada, 1891, III, 6083.

2. The declaration shall be entered and the notice of motion shall be mentioned in the journal, unless otherwise ordered by the house on a motion without notice.

3. It shall be incumbent upon the house, not upon the Speaker, to decide whether the declaration is sufficient to warrant an inquiry.

4. When a motion to proceed to an investigation has been proposed from the chair, the incriminated member may, before withdrawing, explain himself or read a declaration, which shall be entered in the journal. R. 65 n. 2.

5. If the member who has made the charge does not substantiate it, he shall become guilty of a breach of privilege.

Art. 196. - 1. Quand un député désire accuser un de ses collègues de quelque acte rendant celui-ci indigne de siéger dans la chambre, it doit d'abord lire, de son siège,

ordered that such investigation be referred to the Committee on Privileges and Elections.[8]

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une déclaration où l'accusation est énoncée en termes directs, explicites, modérés, et où il prend la responsabilité de l'accusation portée, puis donner immédiatement avis qu'il proposera à la chambre de procéder à une enquête pour constater si l'accusation est fondée.

2. La déclaration est insérée et l'avis est consigné au journal, à moins que la chambre n'en ordonne autrement sur une motion non annoncée.

3. Il appartient à la chambre, et non à l'orateur, de décider si la déclaration est suffisante pour justifier une unquête.

4. Lorsque la motion demandant de procéder à l'enquête est mise en délibération, le député incriminé peut, avant de se retirer, s'expliquer ou lire une déclaration. Celle-ci est insérée au journal.

5.Si le député qui a porté l'accusation ne prouve pas qu'elle est fondée, il devient coupable d'une violation de privilège.

7. Journals of the Legislative Assembly of Quebec, July 8, 1964, p.614 ff.

Mr. Gabias moved:

That the House do proceed to investigate the truth of the charge made against the member for the county of Saint-Maurice, the charge being to the effect that the member for the county of Saint-Maurice has rendered himself unworthy to sit in the Legislative Assembly by giving, or by having caused to be given, a contract of a value of $4,200.00 to Mr. Amédée Bellemare, contractor, in consideration of a sum of $1,500.00 which he pocketed.

Mr. Hamel (Saint-Maurice) stated as follows:

Mr. Speaker,

I understand that proceedings will be carried out in virtue of article 196 of the Rules. I have already stated on television and on public platforms that Amédée Bellemare was a bankrupt and a perjurer, and that it was absolutely false. I have no anxiety whatsoever and I will be happy, Mr. Speaker, to have this matter cleared up. I state that never, at any time, either directly or indirectly, has Amédée Bellemare ever given anything whatsoever to the member for Saint-Maurice. I must say that he did offer to do so.

Furthermore, the member for Saint-Maurice has never recommended, either directly or indirectly, the said Amédée Bellemare, and as a result of the investigation that I made at the time, the Department of Roads would not have given any kind of a contract to Amédée Bellemare, after May 25th or 27th, 1960, at which time the Union Nationale was still in power.

Plaintiff further pleaded that the Committee, having sat and

Mr. Lesage moved, in amendment:

That the motion under debate be amended by striking out all the words appearing after the work "charge" in the fourth line, and by replacing them by the following: "which is contained in the statement made on June 30th, 1964, by the member for Three-Rivers, on pages 591 and 592 of the Journals of the Legislative Assembly for the 1964 session."

Mr. Johnson moved, in sub-amendment, seconded by Mr. Elie:

That the motion for an amendment be amended by replacing the final period by a comma, and by adding thereto the following words: "and which reads as follows:

I, the undersigned, Yves Gabias, member of the Quebec Legislative Assembly for the county of Three-Rivers, wish to accuse the member for the county of Saint-Maurice of an act which renders him unworthy to sit in this House.

During the month of July or August 1960, the member for Saint-Maurice, at the time that he had been declared elected as member for that county, received the sum of $1,500.00 in the form of fifteen (15) one hundred dollar bills, from Mr. Amédée Bellemare, aged 45, a contractor living in Shawinigan East, in the Province of Quebec.

In consideration of this sum of $1,500.00, the member for Saint-Maurice gave, or caused to be given, a contract in the amount of $4,200.00 to the said Amédée Bellemare, the contract being made on August 8th, 1960, between Amédée Bellemare and Patrick Bellemare, on the one hand, and Samson & Marchand, Inc., on the other hand, under which contract signed at Sainte-Flore, Saint-Maurice county, the said Amédée Bellemare would provide the 1" gravel, the loading and crushing thereof, at a price of $0.50 per ton, laid. The 3" gravel to be supplied and laid at a cost of $0.43 per ton.

This concerned a contract awarded by the provincial Department of Roads for work on Boulevard Saint-Onge.

The said sum of $1,500.00 was given by Amédée Bellemare to the member for Saint-Maurice, in his office, in the Department of Labour, around three o'clock in the afternoon. After the sum of $1,500.00 had been given to the member for Saint-Maurice, the latter immediately put the 15 one hundred dollar bills in the right hand pocket of his suit coat and said to Mr. Amédée Bellemare: "Thank you, you're a very smart man."

I am assuming the responsibility for the present accusation and I am giving immediate notice to this House that will propose that it proceed with an inquiry to establish if the accusation is well founded.

In accordance with the Rules and Standing Orders of the Legislative Assembly.

Quebec, June 30th, 1964.

(signed) Yves Gabias, Q.C.
Member for Three-Rivers."

heard witnesses,[9] had unanimously reported on July 29, 1964,

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And the Question being put on the amendment to the amendment, and the names being called for, they were taken down as follows:

YEAS:--MM.--Messrs. Arsenault, Baillargeon, Beaupré, Bédard, Bellemare, Bertrand (Missisquoi), Binette, Blank, Boudreau, Boulais, Brisson, Brown, Cadieux, Charbonneau, Cliche, Cloutier, Coiteux (L'Assomption), Collard, Courcy, Cournoyer, Couturier, Crépeau, Dallaire, Dionne, Dozois, Ducharme, Dupré, Elie, Fortin, Gabias, Gagnon, Gauthier, Gérin-Lajoie, Godbout, Guillemette, Hamel (Iberville), Hanley, Harvey, Hébert, Johnson, Johnston, Kierans, Kennedy, Lacroix, Lafontaine, Lafrance, Lapalme, Laroche, Lavoie (Laval), LeChasseur, Lesage, Lévesque, (Bonaventure), Lizotte, Maheux, Majeau, Martin, McGuire, Meunier, Morissette, Ouimet, Pinard, Raymond, Roy, Russell, Saint-Pierre, Somerville, Théberge, Turpin, Vaillancourt.--69.

NAYS:--0.

So it was resolved in the Affirmative.

The amendment to the amendment was accordingly adopted.

And the Question being put on the amendment as amended, and the names being called for, they were taken down as follows:

YEAS:--MM.--Messrs. Arsenault, Baillargeon, Beaupré, Bédard, Bellemare, Bertrand (Missisquoi), Binette, Blank, Boudreau, Boulais, Brisson, Brown, Cadieux, Charbonneau, Cliche, Cloutier, Coiteux (L'Assomption), Collard, Courcy, Cournoyer, Couturier, Crépeau, Dallaire, Dionne, Dozois, Ducharme, Dupré, Elie, Fortin, Gabias, Gagnon, Gauthier, Gérin-Lajoie, Godbout, Guillemette, Hamel (Iberville), Hanley, Harvey, Hébert, Johnson, Johnston, Kierans, Kennedy, Lacroix, Lafontaine, Lafrance, Lapalme, Laroche, Lavoie (Laval), LeChasseur, Lesage, Lévesque (Bonaventure), Lévesque (Montréal-Laurier), Lizotte, Maheux, Majeau, Martin, McGuire, Meunier, Morissette, Ouimet, Pinard, Raymond, Roy, Russell, Saint-Pierre, Somerville, Théberge, Turpin, Vaillancourt. --70.

NAYS:--0.

So it was resolved in the Affirmative.

The amendment as amended was accordingly adopted.

And the Question being put on the main motion as amended, the House divided, and the names being called for, they were taken down as follows:

YEAS:--MM.--Messrs. Arsenault, Baillargeon, Beaupré, Bédard, Bellemare, Bertrand (Missisquoi), Binette, Blank, Boudreau, Boulais, Brisson, Brown, Cadieux, Charbonneau, Cliche, Cloutier, Coiteux (L'Assomption), Collard, Courcy, Cournoyer, Couturier, Crépeau, Dallaire, Dionne, Dozois, Ducharme, Dupré, Elie, Fortin, Gabias, Gagnon, Gauthier, Gérin-Lajoie, Godbout, Guillemette, Hamel (Iberville), Harvey, Hébert, Johnson, Johnston, Kierans, Kennedy, Lacroix, Lafontaine, Lafrance, Lapalme, Laroche, Lavoie (Laval), LeChasseur, Lesage, Lévesque (Bonaventure), Lévesque (Montréal-Laurier), Lizotte, Maheux, Majeau, Martin, McGuire, Meunier, Morissette, Ouimet, Pinard, Raymond, Roy, Russell,

that the charges were unfounded;[10] and that the House, by

Saint-Pierre, Somerville, Théberge, Turpin, Vaillancourt.--69.

NAYS:--M.--Mr. Hanley.--1.

So it was resolved in the Affirmative.

The main motion as amended was accordingly adopted.

8. Journals of the Legislative Assembly of Quebec, July 8, 1964, pp.618-9. Mr. Lesage moved:

That the investigation that the House has just ordered to establish if the charge made by the member for the Electoral College of Three-Rivers against the member for the Electoral College of Saint-Maurice is true, be referred to the Committee on Privileges and Elections, and that this Committee be empowered to order the appearance of any witnesses and the production of any papers and records that it shall deem necessary, the said Committee to report to the House as soon as possible during the present session.

The motion was adopted.

9. Exhibits of documents tabled before the Committee, Sessional Papers, No. 182; Official transcriptions of the evidence given before the Committee, Sessional Papers, No. 183; tabled in the Assembly, Journals, July 29th, 1964, p.732.

10. Journals of the Legislative Assembly of Quebec, July 29th, 1964, pp.727 ff.

Mr. Beaupré, from the Committee on Privileges and Elections, presented to the House the second report of the said committee, which was unanimously adopted by its members, and which reads as follows:

The Committee on Privileges and Elections had to study a charge made in the House on June 30th, 1964, by the Member for Three-Rivers, against the Attorney-General of the Province, Mr. René Hamel, member for Saint-Maurices, under the provisions of article 196 of the Rules.

This charge reads as follows:

"I, the undersigned, Yves Gabias, member of the Quebec Legislative Assembly for the county of Three Rivers wish to accuse the member for the county of Saint-Maurice of an act which renders him unworthy to sit in this House.

"During the month of July or August 1960, the member for Saint-Maurice, at the time that he had been declared elected as member for that county, received the sum of $1,500.00, in the form of fifteen (15) one hundred dollar bills, from Mr. Amédée Bellemare, aged 45, a contractor living in Shawinigan-East, in the Province of Quebec.

"In consideration of this sum of $1,500.00, the member for Saint-Maurice gave, or caused to be given, a contract in the amount of $4,200.00 to the said Amédée Bellemare, the

unanimous consent, had then read, received and immediately

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contract being made on August 8th, 1960, between Amédée Bellemare and Patrick Bellemare, on the one hand, and Samson & Marchand, Inc., on the other hand, under which contract signed at Sainte-Flore, Saint-Maurice county, the said Amédée Bellemare would provide the 1" gravel, the loading and crushing thereof, at a price of $0.50 per ton, laid. The 3" gravel to be supplied and laid at a cost of $0.43 per ton.

"This concerned a contract awarded by the provincial Department of Roads for work on Boulevard Saint-Onge.

"The said sum of $1,500.00 was given by Amédée Bellemare to the member for Saint-Maurice, in his office, in the Department of Labour, around three o'clock in the afternoon. After the sum of $1,500.00 had been given to the member for Saint-Maurice, the latter immediately put the 15 one hundred dollar bills in the right hand pocket of his suit coat and said to Mr. Amédée Bellemare: "Thank you, you're a very smart man."

"I am assuming the responsibility for the present accusation and I am giving immediate notice to this House that I will propose that it proceed with an inquiry to establish if the accusation was substantiated.

"In accordance with the Rules and Standing Orders of the Legislative Assembly."

In accordance with the mandate that it had been given, the Committee on Privileges and Elections held several sittings and heard a great number of witnesses, in order to substantiate the charge for which the member for Three Rivers had assumed full responsibility, in accordance with the Rules and Standing Orders of the Legislative Assembly.

The principal and essential witness was unquestionably Amédée Bellemare, who repeated his charge against the Honourable René Hamel, declaring before the Committee, just as he had done when questioned on June 12th, 1962, in Bankruptcy Court, and as he had affirmed in his sworn statement of October 25th, 1962, that the two of them were alone at the time when he claims that he gave the money to Mr. Hamel.

Two fundamental principles of the evidence given by the witness Amédée Bellemare should be used in analysing the evidence given before the Committee:

1. The sources of the money that Amédée Bellemare claims that he gave to the Minister Hamel;

2. The obtaining, in return, of one or more contracts by Amédée Bellemare.

Insofar as the source of the money is concerned, the proof included in the record shows that the evidence given by Amédée Bellemare cannot be accepted. It is sufficient, in fact, to compare the evidence given by the bank manager, Mr. Emile Morin, and that given by his assistant, Mr. Gosselin, with the evidence given by Bellemare, to be certain of it. Bellemare swore categorically that he had received $1,500.00 from the Banque Canadienne Nationale, 5th Street, in Shawinigan, after having declared to the Manager of the said Bank, Mr. Emile Morin, that

considered the report.[11]

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it was to be given to Mr. Hamel. Furthermore, Bellemare swore that the said manager, Emile Morin, then gave him 15 one hundred dollar bills. Now, the records of the Banque Canadienne Nationale, 5th Street Shawinigan Branch, formally contradict this evidence. The bank manager, Mr. Morin, is most precise. The withdrawals made from the account of the brothers Bellemare from June 1st to August 30th, 1960, show in the evidence that no amount of $1,500.00 was given to Mr. Amédée Bellemare. Furthermore, the loans ledger shows that Amédée Bellemare did not borrow the sum of $1,500.00 during that period. Lastly, the manager, Mr. Morin, formally denies having given 15 one hundred dollar bills to Amédée Bellemare during the months of July and August 1960, just as he denies that the said Bellemare told him that he was supposed to give such an amount to Mr. René Hamel to obtain the Boulevard Saint-Onge contract.

The sworn statement made by Mr. W. Edmond Casabon, the uncle of Amédée Bellemare, must be added to this evidence. The Committee was impressed by the frankness of this witness, whose statement follows, word for word (exhibit C-36):

"I asked the Honourable René Hamel if it was possible to favour Amédée Bellemare concerning some gravel.

"He answered: "I will never recommend him, I am more likely to put him in gaol."

"I asked him why. He told me "He came and offered me money, it doesn't work that way."

"Questioned on what he had done following his interview with the Honourable Mr. Hamel, Mr. Casabon replied: "I met Amédée Bellemare, and I said: You offered money to the Minister?"

"He said: "Yes, it didn't work."
"I said to him: "If you hadn't had me, you might be in gaol today."

"Later on, when questioned about the answer given by his nephew, Mr. Casabon made the following statement under oath:

"He said to me: "I am not afraid, the two of us were alone. My oath is worth just as much as his."

The second fact that makes it possible to establish the credibility of the witness Amédée Bellemare is the obtaining of one or more contracts by him and his brother. Now, all the witnesses who had, or who might have had, any knowledge of the facts mentioned in the charge have declared, without any hesitation whatsoever, that neither Mr. René Hamel, nor his Executive Secretary, nor any person in his name, intervened to ask or to suggest that the sub-contract to supply gravel for the work on Boulevard Saint-Onge be given to the brothers Bellemare, or that it be taken away from them. Messrs. Marchand and Samson, contractors, as well as Messrs. Larose and Favreau, of the Department of Roads, were particularly explicit. It has been proved, furthermore, that the brothers Bellemare did not get any contract from the Department of Roads after June 22nd, 1960. At the most, they supplied the crushed stone for the work on Boulevard Saint-Onge, which, according to the price list of the Department of Roads, had been awarded tothem back in June 1959. Other orders,

The House had then proceeded to pass the resolution excluding Plaintiff, on motion of the Premier; which resolution was unlawful, Plaintiff argued more particularly, because the Legislature Act, R.S.Q. 1941, c.4, as amended, 'does not permit suspension or exclusion of a Member for a longer period than the duration of a session of the Legislative Assembly and which does not even envisage any sanction against a member guilty of a breach of privilege';[12] and because it infringed the Annotated Rules of the Legislative Assembly[13] which, more

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small ones for the most part, for the purchase of gravel, might have been filled after June 22nd, 1960, but they had been given before that date. The proof shows, in short, and without any shadow of a doubt, that Bellemare did not get any contract from the government through the influence of the member for Saint-Maurice.

According to his own testimony, the member for Three Rivers took upon himself the charge made by Amédée Bellemare, without confirming the truth of it. Before taking such an exceptionally serious step he might have done what one of his colleagues, Mr. Pierre Trudel, did at his request after June 30th 1964, to wit: ascertain the source of the $1,500.00 from the bank manager. He could also have found out from Samson & Marchand, Inc., what were the terms of the contract made between this firm and the brothers Bellemare on August 8th, 1960.

Choosing to give evidence voluntarily, the Honourable René Hamel stated: "I now wish to state, under all the oaths that I have taken, that never, either before the carrying out of the contract, nor during the carrying out of the contract, nor after the carrying out of the contract, did Amédée Bellemare ever give me $1,500.00 or any other amount whatsoever."

The Committee have accordingly reached the following conclusion: the evidence shows that the charge made by the member for Three-Rivers against the member for Saint-Maurice is not justified.

11. Journals of the Legislative Assembly of Quebec, July 29th, 1964, p.732. For certain consequential proceedings, see pp.733-4.

12. The Legislature Act, now R.S.Q. 1964, c.6, envisages only imprisonment as a punishment for breach of privilege: see ss. 66,68, 70, 71. The Act provides for outright expulsion for various corrupt practices; but the seat becomes entirely vacant.

13. Art. 76 is as follows in the English and French versions, the latter of which was the one cited. Emphasis added. The reference to 'immediacy' admits an argument that a motion to continue the operation of a suspension is not envisaged by the rules, or, at least, not by Art. 76. It is particularly interesting to note that the English counterpart to 'exclusion temporaire' is 'suspension' simpliciter. A great deal of argument was based on the thesis that 'exclusion temporaire' meant 'temporary suspension' and was inconsistent with a suspension of three years especially in a Legislature which would stand dissolved by effluxion of time at about the time the suspension would end.

particularly by Art. 76, para. 2, permits the House 'de prononcer contre celui-ci la censure avec ou sans exclusion temporaire.'

The subsequent resolution of January 27, 1965, continuing the suspension in the new session, passed on motion of Mr. Laporte, was, Plaintiff argued more particularly in his petition, unlawful as contrary to the Legislature Act; which, he said, did not permit the suspension or exclusion of a Member for longer than the duration of one session of the Legislative Assembly; which did not even provide for any sanction against a Member who has been guilty of a breach of privilege; and which no more allowed two punishments at different times for the same offence than did any other law of the Province of Quebec. The resolution was furthermore said to be unlawful as contrary to the Annotated Rules of the Legislative Assembly, which, it was submitted, did not permit the revival of a resolution annulled by the termination preceding Session without the unanimous consent of the House, did not permit the condemnation by the House of one of its members for a breach of privileges when he had committed none, and which permitted no abuse of powers by a majority of its members.

Plaintiff alleged that the resolutions in question excluding Plaintiff and depriving the electors of Three-Rivers of a Member, was an abuse of power which had caused and was causing Plaintiff a serious and irreparable wrong and grave prejudice which he had a right to cause to cease, and which was not compensable in money; that the exclusion to the prejudice of himself and the electors had been persisted in despite his protest and that of other members; that its continuance constituted serious and irreparable wrong to himself and to his electors which he was entitled to cause to cease immediately; that the respondent Assembly would suffer no prejudice, inconvenience or wrong; that the Plaintiff petitioner had no remedy equally appropriate, advantageous, and effectual; that

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76.--1. If a member is called to order by name, he shall not be allowed to address the Speaker during the remainder of the sitting.

2. Moreover, the house may, if a motion is immediately submitted to that effect, either order the Speaker to admonish or reprimand such member, or pronounce censure upon him with or without suspension.

3. The member referred to by such a motion shall, as soon as it is proposed from the chair, withdraw while the motion is under debate.

4. The member against whom the suspension has been pronounced shall immediately withdraw from the chamber, and he shall enter no part of the chamber. If he omits or refuses to withdraw from the chamber, or if he enters any part whatsoever of the chamber, the Speaker, after being authorized to do so by the house on a motion without notice, shall order the sergeant-at-arms to expell him.

Art. 76.--1. Si un député est rappelé nominativement à l'ordre, la parole lui est par là même interdite pour le reste de la séance.

2. La chambre peut en outre, si une motion à cet effet est immédiatement présentée, ordonner à l'orateur d'admonester

Plaintiff offered security; and that the Superior Court for the Quebec District was competent to hear the cause.

By his petition Plaintiff accordingly sought by way of relief an immediate interlocutory injunction enjoining the Respondent, its Speaker, Chairman of Committees, Members, Clerk, Sergeant-at-Arms, Officers, employees, messengers, doorkeepers and servants, under all pains of law, to cease and cause to cease immediately, all proceedings, decisions, and acts preventing or having the effect of preventing the Petitioner from entering the Chamber, sitting in the Legislative Assembly, and speaking there, as an effect or consequence of the resolutions of July 29, 1964, and January 27, 1965; and to cease or cause to cease immediately all proceedings, decisions, or acts removing or tending to remove from the Petitioner his aptitude to exercise his recognized immunities and privileges as Member for Three Rivers, by way of effect or consequence of the said resolutions; and that the Court fix the security which petitioner declared himself ready to offer; the whole with costs against respondent.

By order of the Court on March 15, 1965, notice of presentation of this petition on March 23, 1965, was given to the 'Legislative Assembly of Quebec'.

By an Appearance dated March 19, 1965, Me. Louis-Philippe Pigeon, Advocate, appeared on behalf of the Attorney-General of the Province of Quebec, representing Her Majesty in right of the Province.[14]

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ou de réprimander ce député, ou bien prononcer contre celui-ci la censure avec ou sans exclusion temporaire.

3. Le député visé par une telle motion doit, dès qu'elle est mise en délibération, se retirer pour le temps que durera la discussion de la motion.

4. Le député contre qui l'exclusion a été prononcée doit se retirer immédiatement hors de la salle, et il ne peut pénétrer dans aucune partie de celle-ci. S'il néglige ou refuse de se retirer de la salle ou s'il pénètre dans une partie quelconque de celle-ci, l'orateur, après y avoir été autorisé par la chambre sur une motion non annoncée, ordonne au sergent d'armes de l'expulser.

[Note: Art. 76 § 2

On ne saurait contester à un corps législatif le pouvoir de suspendre ou expulser un de ses membres pour une raison jugée suffisante. Ce pouvoir est essentiel pour assurer la dignité et l'utilité de ce corps.

14. By Art. 311a of the Code of Procedure of 1897, 'In any action relating to the application of a provision of public order, the Attorney-General or any crown prosecutor may ex officio and without notice, take part in the trial and hearing as if he were a party thereto.' See now Art. 99 of the Code of Procedure of 1965.

By certificate of the Deputy Prothonotary, made and filed of record on March 23, 1965, the failure of Defendant Legislative Assembly of Quebec to appear, and the registration of such default, was declared.[15]

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15. The failure of the Assembly to appear, and the appearance of the Attorney-General, will be explained by consideration of the letter of opinion by which Me. Louis-Philippe Pigeon, Q.C., advised the Speaker on the appropriate course of conduct, and of the reply by which the Speaker requested that the necessary measures be taken; Débats de l'Assemblée législative du Québec, 4th Sess., 27th Legre., Vol. 2, No. 32, March 18th, 1965, p.1353ff. The letter as read to the House appears in the following exchange, which is here reproduced in its entirety:

M. LE PRESIDENT: A l'ordre, messieurs. Tel que je l'ai indiqué hier, je voudrais produire à la Chambre les documents que j'ai reçus et la correspondance que j'ai eue à propos de ces documents. Je vais lire la correspondance. Premièrement, une lettre que j'ai écrite moi-même en date du 16 mars 1965 àMe. L.P. Pigeon, conseiller juridique, Chambre 324C Hôtel du gouvernement, Québec.

Sujet: S.C. 138195 Gabias contre l'Assemblée législative.

"Cher monsieur Pigeon,

Je vous transmets les deux documents suivants: premièrement requête pour bref d'injonction interlocutoire et avis, deuxièmement bref d'assignation et d.claration. Ces deux documents m'ont été signifiés personnellement à 11 heures quarante-cinq ce matin.

Auriez-vous l'obligeance d'étudier les documents annexés et me donner votre avis sur l'attitude que je devrais prendre dans les circonstances.

Bien à vous,

Richard Hyde
Président de l'Assemblée législative."

M. LE PRESIDENT: Une deuxième lettre, c'est une lettre que je reçois aujord'hui de M. Pigeon, datée le 18 mars 1965, adressée à M. Hyde, président de l'Assemblée législative de Québec.

M. Hyde, orateur de l'Assemblée législative de Québec.

"Cher monsieur Hyde,

Selon la demande faite par votre lettre du 16 courant, j'ai pris connaissance de la requête pour bref d'injonction interlocutoire ainsi que du bref d'assignation et de la declaration qui vous ont été signifiés de la part de M. Joseph-Paul-Yves Gabias, députt. des Trois-Rivières. Dans ces procédures l'intimée est décrite comme suit:

"L'Assemblée législative de la province de Québec, corps politique constitué par l'Acte de l'Amerique du Nord

britannique 1867, article 71, ayant siège en la cité de Québec, district de Québec."

"Les faits allégués sont les résolutions adoptées le 29 juillet 1964 et le 27 janvier 1965 aux fins d'exclure le requérant pour une période de trois ans et les circonstances dans lesquelles elles ont été adoptées. Les conclusions sont essentiellement une demande en nullité de ces résolutions et une injonction défendant de les mettre à effet.

"Ayant fait une revue de la doctrine et de la jurisprudence sur les questions soumises, j'en suis venu à la conclusion que votre devoir en l'occurence est de ne rien faire qui implique de quelque manière que l'Assemblée législative est justiciable des tribunaux. En effet, c'est l'un des privilèges les plus fondamentaux du Parlement que l'immunité absolue de poursuite en raison d'un acte quelconque de procédure parlementaire. Ce privilège a été reconnu par l'article 9 du "Bill of Rights" de 1688 dans les termes suivants

"9": "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

En 1958, la Chambre des Lords a rendu sur un renvoi une décision qui reconnaît à la Chambre des Communes le pouvoir de traiter comme une violation de privilège une menace de poursuite contre un de ses membres en raison d'un acte accompli dans ses fonctions de député (in re: Parliamentary Privilege Act, 1770,--et la référence 1958 A.C., c'est Cour d'Appel, "Appeal Court".

M. LESAGE: "Appeal cases".

M. LE PRESIDENT: "Appeal cases" (1958 Appeal cases, page 331.)

"On ne peut pas douter que ce principe soit applicable ici. En effet, la Cour Suprême du Canada a récemment décidé dans une cause intentée en cette province que la preuve de paroles prononcées à la Chambre des Communes était inadmissible (Procureur général du Canada c. l'Association du Reader's Digest, 1961 R.C.S. page 775).

"Plus récemment encore, la Cour du Banc de la Reine du Manitoba a décidé que les tribunaux n'avaient pas compétence pour statuer sur le droit d'un député de siéger à une Assemblée législative. Elle a déclaré que c'est l'Assemblée elle-même qui devait trancher cette question.

(Regina Ex Relations Stubbs contre Steinkopf (1964) 49 W.W.R. (Western Weekly Reports), à la page 759.)

"Un arrêt semblable a été rendu il y a quelques années par la Cour d'appel d'Ontario dans The King Ex Rel. Tolfree versus Clark & al (1943,3D.L.R., à la page 684).

"Ces arrêts suivent la décision de la Cour d'appel d'Angleterre dans Bradlaugh contre Gossett (1884, 12 Queen's Bench, page 271) où l'on a statué comme suit:

"The House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute law which has relation to its internal procedure only. What is said or done within its walls cannot be inquired into in a court of law".

"Si les procédures étaient comme dans les cas ci-dessus relatés dirigées contre un ou des individus et non pas contre l'Assemblée législative elle-même, il y aurait lieu de considérer s'il peut leur être permis de comparaître devant les tribunaux aux fins d'invoquer le privilège. En effet, on peut voir dans May (16e édition, pages 159 à161) qu'à l'occasion de poursuite intentée contre l'Orateur, la Chambre des Communes lui donna la permission de comparaître tout en chargeant le procureur général de le défendre. Une pareille ligne de conduite ne semble pas possible lorsque c'est contre l'Assemblée elle-même que la poursuite est dirigée. Le concept même de l'immunité fait obstacle à la désignation d'un procureur collectif. En effet, cette seule désignation impliquerait que l'Assemblée est une personne seule d.signation impliquerait que l'Assemblée est une personne susceptible d'être représentée par procureur devant les tribunaux, ce qui est précisément contraire à sa nature et à ses privilèges.

"A titre d'Orateur, l'un de vos devoirs est de défendre les privilèges de l'Assemblée. Vous vous y êtes engagé formellement en acceptant ce poste. Vous devez donc vous abstenir de poser un geste susceptible d'être préjudiciable aux privilèges que vous devez défendre. Je crois donc qu'en portant officiellement à la connaissance de l'Assemblée les procédures qui vous ont été signifiées comme son représentant, il n'y a pas lieu pour vous de l'inviter à désigner un procureur aux fins de comparaître et de plaider.

"Evidemment, l'avis que j'exprime sur la question ne prétend pas disposer du litige dont les tribunaux sont saisis. Bien que, suivant l' arrêt de la Chambre des Lords mentionné au début, l'Assemblée législative pourrait en l'occurrence user de son pouvoir coercitif pour faire échec aux procédures parce qu'elles constitutent une violation de ses privilèges, je ne crois pas devoir suggérer cette façon de procéder.

"Je dois cependant signaler que l'article 735 du règlement démontre qu'il y a bien violation des privilèges de la Chambre par l'institution des procédures. En effet, le paragraphe 1 de cet article est dans les termes suivants:

"1. Aucun député,aucun officier de la Chambre, aucun sténographe qui a recueilli des dépositions faites devant la Chambre ou un de ses comités, ne peuvent, sans l'autorisation expresse de la Chambre, déposer devant les tribunaux au sujet des opérations de la Chambre ou d'un de ses comités, ni au sujet des dépositions qui y ont été faites".

"Or, la requête pour bref d'injonction est accompagnée d'une déposition sous serment du requérant dans laquelle, sans l'autorisation de la Chambre, il se trouve à relater au tribunal toute une série d'opérations de la Chambre. Il est sûr que l'Assemblée pourrait imposer pour cette violation de privilége les sanctions prévues par le règlement, y compris l'emprisonnement.

"Cependant...

M. BELLEMARE: Un autre trois ans!

M. LESAGE: Y compris l'emprisonnement.

M. LE PRESIDENT: A l'ordre, messieurs.

M. JOHNSON: Voyons donc!

M. LE PRESIDENT: Cependant, comme il y a lieu de faire en sorte que le privilège de la Chambre soit défendu devant le tribunal, il faut, je crois, porter le tout à la connaissance du procureur général. Comme il s'agit évidemment d'une instance touchant à l'application d'une disposition d'ordre public, celui-ci peut sûrement intervenir pour invoquer le privilège qui, à mon avis, fait obstacle à la poursuite.

Veuillez me croire, votre bien dévoué,

Louis-Philippe Pigeon".

M. LE PRESIDENT: A la réception de cette lettre, j'ai envoyé il y a quelques instants, au procureur général, une lettre qui se lit comme suit:

"Le 18 mars 1965.

L'honorable procureur général,
Hôtel du Gouvernement,
Québec.

Le sujet: C.S. 138195, Gabias - vs - l'Assemblée législative.

M. le ministre, je vous transmets les documents suivants:

1.-Photostat d'une copie de requête pour bref d'injonction interlocutoire et avis;

2.-Photostat d'un bref d'assignation et déclaration;

3.-Copie d'une lettre en date du 16 mars que j'ai écrite à Me L.-P. Pigeon;

4.-Photostat d'une lettre en date du 18 mars qui m'a été adressée par Me L.-P. Pigeon.

Auriez-vous l'obligeance de prendre les mesures qui s'imposent dans les circonstances.

Bien à vous,

J.-Richard Hyde
Président de l'Assemblée législative."

M. LE PRESIDENT: Je dépose les documents avec les documents qui m'ont été signifiés l'autre jour.

Je dois faire remarquer que les documents que je viens de lire devraient être consignés au journal, d'après le règlement.

M. JOHNSON: Très bien.

M. LE PRESIDENT: J'ai des copies pour le premier ministre et pour le chef de l'Opposition.

M. JOHNSON: M. le Président, je vous remercie d'avoir déposé les documents en vous conformant au règlement. J'ai cependant, avec votre permission, à vous poser une question. Qui vous a dirigé vers tel ou tel avocat pour prendre avis? Est-ce la Chambre, de votre propre initiative ou sur les

conseils de quelqu'un d'autre?

M. LE PRESIDENT: Je dois répondre simplement que dès que j'ai reçu ces documents, je me suis dirigé personellement avec les documents au bureau de M. Pigeon qui se trouve au Parlement. Il n'était pas là, mais je l'ai rencontré à la première occasion durant l'après-midi, le mardi, le 16.

Following hearing on March 23rd, 1965, at which the Court heard argument by Me. Pigeon [entered in the Minutes as appearing for the Attorney-General of Quebec under Art. 311a of the Code of Procedure] and by Me. Gabias, judgment was rendered on May 3rd, 1965, by Hon. Mr. Justice Casgrain, dismissing the petition, as follows:

CASGRAIN, J.

Il s'agit d'une demande d'injonction interlocutoire. Le requérant, Mtre Yves Gabias, articule dans sa requête qu'il a été élu député pour le collège électoral de Trois-Rivières, le 14 novembre 1962; qu'il a rempli toutes les formalités exigées par la loi; qu'il a siégé à l'Assemblée législative de la province de Québec jusqu'à ce qu'il en eût été exclu par des résolutions adoptées le 29 juillet 1964 et le 27 janvier 1965.

Il allègue que ces deux résolutions d'expulsion sont inconstitutionnelles, ultra-vires des pouvoirs conférés à l'intimée, nulles, irrégulières, illégales à leur face même, non avenues, sans effet parce qu'elles constituent un abus de droit et il conclut en ces termes:-

> "POUR CES MOTIFS, PLAISE AU TRIBUNAL.
>
> ACCORDER une injonction interlocutoire immédiate enjoignant à l'intimée, Son Orateur, son président de comité, ses membres, son Greffier, son Sergent-d'Armes, ses officiers, ses employés, ses messagers, ses portiers et ses serviteurs, sous les peines de droit,
>
> A.-De cesser et faire cesser immédiatement toute procédure, décision ou acte empêchant ou ayant pour effet d'empêcher le requérant, député du collège électoral de Trois-Rivières, de pénétrer dans la Salle, de siéger à l'Assemblée législative et d'y prendre la parole, comme effets et conséquences d'une résolution adoptée à la majorité des voix des membres de l'Assemblée législative, en date du 29 juillet 1964 et dont la conclusion stipule et ordonne que "le requérant "député de Trois-Rivières soit exclu pour une période de trois ans" et d'une seconde résolution, adoptée à la majorité des voix des membres de l'Assemblée législative, en date du 27 janvier, 1965 et dont la conclusion stipule et ordonne que la sanction décrétée, imposée par la résolution du 29 juillet, 1964, "soit d'être exclu pour une période de trois ans, continue d'avoir effet pendant la présente session.
>
> B.-De cesser ou faire cesser immédiatement toute procédure, décision ou acte enlevant ou tendant à enlever au requérant-député du collège électoral de Trois-Rivières, son habilité à exercer

les immunités et privilèges reconnus au député du collège électoral de Trois-Rivières, comme suites, effets et conséquences d'une résolution adoptée à la majorité des voix des membres de l'Assemblée législative, en date du 29 juillet 1964 et dont la conclusion stipule et ordonne que le requérant "député de Trois-Rivières soit exclu pour une période de trois ans" et d'une seconde résolution adoptée, à la majorité des voix des mebres de l'Assemblée législative, en date du 27 janvier 1965 et dont la conclusion stipule et ordonne que la sanction imposée par la résolution du 29 juillet 1964, soit:

"d'être exclu pour une période trois ans, continue d'avoir effet pendant la présente session.

FIXER le cautionnement que votre requérant est prêt à donner et qu'il donnera suivant la loi;

Le tout avec dépens contre l'Intimée."

A ce stade de la procédure, je ne suis pas appelé à décider du fond du litige; je dois m'enquérir si la poursuite pouvait être dirigée contre l'Assemblée législative elle-même et,,dans l'affirmative, si celle-ci est soumise, en raison de ses actes de procédure, au droit de surveillance et de réforme de la Cour Supérieure en vertu de l'art. 50 du Code de Procédure civile qui se lit ainsi:-

> "50.-A l'exception de la Cour du banc du roi, les tribunaux relevant de la compétence de la Législature de Québec, ainsi que les corps politiques et les corporations dans la province, sont soumis au droit de surveillance et de réforme de la Cour Supérieure, en la manière et en la forme prescrites par la loi, sauf dans les matières que la loi déclare être du ressort exclusif de ces tribunaux, ou de l'un quelconque de ceux-ci, et sauf dans les cas où la juridiction découlant du présent article est exclue par quelque disposition d'une loi générale ou particulière."

Le requérant soutient que l'Assemblée législative de la province de Québec est un corps politique constitué par l'Acte de l'Amérique du Nord Britannique de 1867, article 71, ayant siège dans la cité de Québec, district de Québec. L'article 71, auquel réfère le requérant, édicte:-

> "Qu'il y aura, pour Québec, une Législature composée du lieutenant-gouverneur et de deux chambres appelées le Conseil législatif et l'Assemblée législative de Québec."

C'est l'article 80 de la constitution qui a constitué l'Assemblée législative. La première partie seule nous intéresse; elle se lit ainsi:-

> "L'Assemblée législative de Québec se composera de soixante et cinq membres, qui seront élus pour représenter les soixante et cinq divisions ou districts électoraux du Bas-Canada, mentionnés au présent acte, sauf toute modification que pourra y apporter la Législature de Québec....."

(Inutile de dire que depuis la Législature a fait des modifications et que l'Assemblée législative se compose aujourd'hui de 95 membres).

L'article 86 de la constitution édicte qu'il y aura une session de la Législature de Québec au moins une fois par année.

Il n'y a donc rien dans ces textes qui confère à l'Assemblée législative une entité juridique au sens de la loi ayant le droit d'ester en justice. Tout ce que dit la constitution est que l'Assemblée législative est composée de 65 représentants du peuple (maintenant 95) qui se réunissent au moins une fois par année pour légiférer. Il s'agit d'un corps législatif qui n'a pas une personnalité juridique distincte de celle de chacun des membres qui le composent et qui, par conséquent, ne peut être poursuivi comme tel.

Que signifient les mots "CORPS POLITIQUE" de l'article 50 du Code de procédure civile? Suivant nous, ils s'appliquent aux corporations qui poursuivent un objet d'intérêt public, telles les corporations municipales et scolaires, ou à tout autre corps d'intérêt public légalement constitué et non à l'Assemblée législative.

C'est, d'ailleurs, la première fois qu'une poursuite est intentée contre l'Assemblée législative elle-même. Dans toutes les causes qui ont été citées et dans celles que j'ai examinées, les procédures étaient prises contre un ou des individus.

Si l'Assemblée législative de la province de Québec est un corps politique constitué par l'Acte de l'Amérique du Nord Britannique 1867, le Sénat, la Chambre des Communes et le Conseil législatif seraient aussi des corps poliques pouvant ester en justice.

Personne avant le requérant, semble-t-il, n'a soutenu une telle théorie qui ouvrirait la porte à tous les abus.

Même si la poursuite était légalement instituée, ce que je n'admets pas, la Cour Supérieure pourrait-elle intervenir et décider que l'Assemblée législative est justiciable des tribunaux; en d'autres termes, qu'elle ne jouit pas de l'immunité de poursuite en raison d'un acte quelconque de procédure parlementaire. Ce privilège lui a toujours été reconnu dont celui d'expulser un de ses membres. Nous lisons ce qui suit dans BEAUCHESNE:-

"The right to expel a member is inherent in any legislative body that has power to regulate its own constitution."

BEAUCHESNE'S PARLIAMENTARY RULES AND

FORMS. 4ème édition, 1958. p.45, No 56.

"The House has always asserted the right to provide for the constitution of its own body, the right to regulate its own proceedings and the right to enforce its privileges Anson p.153.

BEAUCHESNE.-op.cit., p.94 2".

BOURINOT est de la même opinion:

> "The right of a legislative body to suspend or expel a member for what is sufficient cause in its own judgment ins undoubted. Such a power is absolutely necessary to the conservation of the dignity and usefulness of a legislative body.
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> BOURINOT'S PARLIAMENTARY PROCEDURE
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> 3ème édition, p.162. No. XVI.

Le requérant, pour contourner cette difficulté, a soutenu que la Législature n'est pas un parlement et qu'elle bénéficie d'une seule immunité, celle prévue à l'article 57, du chap.4 S.R.Q. 1941, qui se lit ainsi:-

> "57.-Nul conseiller législatif ou député n'est sujet à une action,à une arrestation ou à un emprisonnement, ou à des dommages-intérêts à raison d'une matière ou chose par lui présentée par pétition, bill, résolution, proposition ou autrement, à la Chambre ou à un de ses comités, ou à raison de paroles par lui prononcées devant cette Chambre.
>
> Le fait d'intenter une telle action, de procurer ou opérer une telle arrestation ou un tel emprisonnement et d'adjuger des dommages-intérêts, est considéré comme une violation des dispositions du présent paragraphe.

Selon le requérant, l'article 18 de "l'ACTE de 1'Amérique Britannique du Nord 1867" me s'appliquerait pas à l'Assemblée législative. Il se lit ainsi:

> "18.-Les privilèges, immunités et pouvoirs que posséderont et exerceront le Sénat, la Chambre des Communes et les membres de ces corps respectifs, seront ceux prescrits de temps à autre par acte du Parlement du Canada; ils ne devront cependant jamais excéder ceux possédés et exercés, lors de la passation du présent acte, par la chambre des communes du Parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande et par les membres de cette chambre."

Il s'appuie sur BEAUCHESNE, mais l'opinion de celui-ci n'est pas admise par BOURINOT. Voir BOURINOT'S PARLIAMENTARY PROCEDURE.

3ème édition, pages 148, 156 et 159.

Et aussi:-

ARE THE PROVINCIAL LEGISLATURES PARLIAMENTS. CAN. BAR REVIEW,-(1943) page 826.-

C'est ce qui a d'ailleurs été décidé dans la cause de REGINA ex REL STUBBS V. STEINKOFF: 49 W.W.R., page 759:-

"It has been clearly establish[ed] as early as the reign of the first Queen Elizabeth that the qualification of members of parliament must be decided by the House of Commons, itself. As was stated in ONSLOW V. RAPLEY (1681) 3 Lev. 29, at 30. 83 ER 561:

"*****it would be great presumption in this Court to meddle with Elections to Parliament before the Matter hath been determined in Parliament."

The same thought was expressed by North L.J. in 6 How State Tr (1810) col. 1109, as follows:

> "The Judges in all times have been very tender of meddling with matters relating to parliament. I do not find that ever they tried elections, but where statutes give them express power;*****

This constitutional principle which was established in the mother of parliaments applies equally to the House of Commons at Ottawa and to the provincial legislatures. In so far as it has not been expressly delegated to the courts by legislation the power remains in the legislature."

(C'est moi qui ai souligné).

Voir aussi:-

THE KING EX REL. TOLFREE V. CLARK & AL. (1943) 3 D.L.R. 684.

Dans une cause de CHARLES WILLIAM CROSS & WILLIAM FREDERIX WALLACE CARSTAIRS (47, R.C.S. page 559), la Cour Suprême a décidé qu'elle ne pouvait intervenir dans des procédures en contestation d'élection, parce que la Législature

de l'Alberta ne lui avait pas donné ce droit. Voici comment s'exprime le juge Idington à ce sujet (page 564):-

> IDINGTON J.- The provincial legislatures are each entitled to declare how the members of its legislative assembly are to be elected, the validity of their elections are to be tested and determined, in the case of dispute thereabout, and how the proceedings adopted to apply such test and procure such determination are to be had and the consequences of such determination.
>
> Parliament has not the slighest right of its own mere will to interfere.
>
> It never was intended by section 101 of the "British North America Act" that the appellate court therein contemplated should be given, as against the will of the legislature, any jurisdiction over the subject of elections to the legislative assembly.
>
> Such a mode of determining the right to sit in any parliament or legislature (of higher order than a municipal council), as trial by the judges of the ordinary courts of the country had not, when the "British North America Act" was passed, either in England or here, ripened into a practical legal conception.
>
> Such bodies had always guarded as one of their most precious privileges the right to determine all such questions."

L'Assemblée législative n'a même pas comparu; en effet, son aviseur légal avait informé l'Orateur qu'il était de son devoir de ne rien faire "qui implique de quelque manière que l'Assemblée législative est justiciable des tribunaux". C'est le procureur-général qui a invoqué les articles 311a et 420b du C.P.C. et qui a comparu pour défendre ses privilèges.

Dans ces conditions, peut-on croire que l'intimée se conformerait à un jugement qui lui ordonnerait de cesser de mettre à exécution les résolutions qu'elle a passées le 29 juillet 1964 et le 27 janvier 1965? Un tel jugement serait-il exécutoire?

PAR CES MOTIFS. j'en viens à la conclusion que le requérant ne pouvait poursuivre l'Assemblée législative elle-même; que celle-ci n'est pas soumise au droit de surveillance et de réforme de la Cour Supérieure en raison de ses actes de procédure et que je n'ai pas juridiction pour lui enjoindre "de cesser toute procédure, décision ou acte empêchant ou ayant empêché le requérant" de siéger.

Par conséquent, la présente requête est IRRECEVABLE et elle est REJETEE.