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THE LAW

OF

THE CANADIAN CONSTITUTION

— BY —

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PREFACE.

In this work, I have endeavored to exhibit, in as compact a form as the wide scope of the subject permits, the Law of the Canadian Constitution in reference as well to our position as a Colony of the Empire, as to our self-government under the federal scheme of the B. N. A. Act.

No work upon the first branch of the subject is in existence. The works of Clark and Merivale upon the Colonies are very antiquated, and since their publication the colonial system of the British Empire has to a very great extent been recast. In collecting the authorities, therefore, upon this branch of English jurisprudence into one book, I shall, at least, have done something to lighten the labor of those who have occasion to deal with questions relating to our connection with the Mother Country.

Upon the second branch—our internal self-government under the B. N. A. Act—the need of such a book as this has been felt for some time. Mr. Doutre's work was prepared at a time when judicial leaning was very largely toward minimizing the sphere of provincial autonomy, and the decisions since that date have not only been numerous, but those of the Judicial Committee of the Privy Council, particularly, have given a very different aspect to the law governing the relations of the provinces to the federal government.

I have also endeavored to exhibit clearly the position of the provinces and territories acquired since 1867, and have referred as freely to the decisions of the Courts in those more recent additions to the Dominion as to the authorities in the older provinces.

A glance at the Table of Contents will suffice to disclose the general mode of treatment I have adopted, and further remarks here would serve no good purpose. While, fully sensible of many defects in the execution of this work, I have strong hopes that it may prove useful, not merely to the profession, but to all those who desire information in reference to our rather unique form of government.

W. H. P. CLEMENT.

TORONTO,
26th Sept., 1892.

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ERRATA ET CORRIGENDA.

Page 40, line 19—for "*clearly*" read "*equally.*"

" 120, " 12—" "*we have enumerated*" read "*enunciated.*"

" 187, " 32—" "*on*" read "*no.*"

" 194, What is said in the note (*c*) is subsequently qualified; see pp. 348-9.

" 228, The sentence beginning on line 4, is subsequently qualified.

" 289, line 18—for "1875" read "1874."

" 297, " 5— " "*distribution*" read "*re-distribution.*"

" — " 10— " "1892" read "1891."

" 406, Reference should be made to the decisions in British Columbia; see p.—

" 429, head-line—for "*sec. 91*" read "*sec. 92.*"

" 444, line 18—for "*majorities*" read "*majority.*"

" 469, " 18—" "*35 Vic.*" read "*53 Vic.*"

" 479, line 4—for "*milked*" read "*milk.*"

" 588, note (*f*)—supply reference to p. 470.

PART I.

INTRODUCTORY.

THE

Law of the Canadian Constitution.

CHAPTER I.

OUR POLITICAL SYSTEM—A COMPARATIVE EXAMINATION.

By virtue of a certain Act (*a*), passed by the Parliament of the United Kingdom, and Her Majesty's proclamation pursuant thereto (*b*), the Dominion of Canada became "a new thing under the sun" of the first day of July, 1867. The Imperial Act provides for its own citation as "The British North America Act, 1867," but we shall not only save space, but conform also to usage on this side of the Atlantic, by using throughout the shorter title of "The B. N. A. Act" (*c*). For a quarter of a century our form of political organization has been, under that Act, a "general" government (of which we shall always speak as the "Dominion" government), charged with matters of common interest to the whole country, and "local" governments (to be spoken of as "Provincial" governments), charged with the control of local matters in their respective sections.

(*a*) 30 & 31 Vic. c. 3 (Imp). (*b*) Sec. 3.

(*c*) Subsequent amendments are similarly entituled, but whenever it becomes necessary to refer to any one of them, we shall, by way of distinction, add the year.

The sphere of political activity, assigned to each of these two sorts of government, is carefully mapped out in the B. N. A. Act; taken together, they comprise the most extensive field of colonial self-government in the British Empire to-day. The constitution, too, of each of these governments is provided for, either expressly, as in the case of the Dominion government, or by the incorporation into the Act of previously existing constitutions, as in the case of some, at least, of the Provincial governments.

In the preamble to the B. N. A. Act, it is recited that the provinces of Canada, Nova Scotia and New Brunswick, had expressed their desire for a federal union into one Dominion, "*with a constitution similar in principle to that of the United Kingdom*," and the opinion is ventured that such a union would conduce to the welfare of the provinces, and promote the interests of the British Empire. "Be it *therefore* enacted," etc.

A clearer indication that the design of the B. N. A. Act was to establish in Canada such a union with such a constitution as was desired by the petitioning provinces, could hardly have been given. The expression of desire to which the Act refers in the recital above quoted, is to be found in the third and fourth of the resolutions passed at the Conference, at Quebec, of delegates from the various provinces:

"III. In framing a Constitution for the General Government, the Conference, with a view to the perpetuation of our connection with the Mother Country, and the promotion of the best interests of the people of these provinces, desire to follow the model of the British Constitution so far as our circumstances will permit.

"IV. The Executive authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well-understood principles of the British Constitution, by the Sovereign personally, or by the representative of the Sovereign, duly authorized."

It should, perhaps, be noticed that these resolutions make reference to the constitution of the "general" government only, and the preamble to the B. N. A. Act is capable of a similarly limited interpretation. The observation applies, too, to the additional recital in the preamble, that "it is expedient not only that the constitution of the legislative authority in the Dominion be provided for, but also that the nature of the executive government therein be declared." A perusal of the next chapter, however, and of what is there said in reference to the survival of the pre-Confederation provinces,—the continuity (so to speak) of their legislatures and their executive authority,—will; as we proceed, suffice to show that our present argument applies *a fortiori* to the Provincial Constitutions.

Reverting then to the preamble to the B. N. A. Act, one would naturally expect that the design so clearly announced, would be effectually carried out in the enacting clauses of the Act. There have not been wanting, however, those who have contended that the performance has fallen far short of the promise; that the B. N. A. Act is in its preamble a notable instance of "official mendacity" (*d*); and that the effect of its enactment has been, the establishment in Canada of a system of government presenting features analagous rather to those of the government of the United States than to those of the British constitution. This view of the Canadian constitution is quite erroneous, founded upon a very superficial observation of the structure of government in this Dominion, and wanting in a proper regard for the underlying principle, in conformity to which

(*d*) Dicey (Prof. A. V.)—"The Law of the Constitution," 3rd ed., p. 155. As the Professor himself would say, "it is worth noting" that the criticism of this preamble, in which he indulges, is inaccurate. The provinces *had* expressed their desire for a constitution "similar in principle," etc., as a perusal of the Resolutions, above quoted, will show, and the preamble therefore is literally true. We waive, however, this verbal criticism of the Professor's statement, and treat it as indicative merely of his view of the effect of the B. N. A. Act.

the pre-Confederation provinces had been governed, and the Dominion and its federated provinces have since been governed,—the principle, as we shall endeavor to show, which is the chief distinguishing feature of the British form of government, the Empire over, as contrasted with the constitution of the United States. Because the union of the B. N. A. provinces is federal, indicating, *ex necessitate*, some sort of a division of the field of governmental action, an allotment of some part of that field to a "central" government, the conclusion is rashly arrived at, that these matters of outward and superficial resemblance between our system of government and that of the neighboring Republic, are sufficient to stamp them as essentially alike. A closer examination of the B. N. A. Act itself, coupled with some slight knowledge of the pre-existing provincial constitutions, and their practical working, would have sufficed to show that, in essentials, we have a constitution not like the constitution of the United States, but "similar in principle to that of the United Kingdom." In this instance, at least, the Imperial parliament has not laid itself open to the reproach addressed in Holy Writ to certain unnatural parents. We in Canada labor under the impression that we have got what we asked for; whether it is, or is not, good for us, is not, perhaps, matter for discussion in a work of this kind.

To arrive at an intelligent conclusion upon this much discussed question—to which form of government, the British or the American, does our government in principle conform?—one must necessarily first formulate in his own mind some definite notion of the difference in principle between these two systems, with which in turn we desire to compare or contrast ours. It may, perhaps, turn out that a candid comparison will disclose that the difference between them should hardly be characterized as a difference *in principle*,—that in each the same motive power is applied to the same end, with only some difference in the mode of application.

The British Empire and the American Union consist, each of a central or "national" government, with subordinate "local" governments. The central government in each is the only organization entitled to international recognition as the embodiment of the national will; but it is, at the same time, the comprehensive organism which overlies and binds together the various "local" governments existing within the borders of the Empire or Union. In the case of the United States, the central or Federal government has always received treatment as a tangible "national" government over one compact territory; but the British Constitution has, as a rule, been looked at as the constitution rather of Great Britain, than as an Imperial constitution. The reason is partly geographical, partly historical. The Imperial constitution, as it to-day exists, is the result of the gradual application to the government of an expanding empire, of those principles of local self-government which were adopted, at the start, as the basis of the federal union of the American colonies but this *Imperial* phase of the British constitution has been rather overlooked. If we can, in imagination, place ourselves in the world of (say) 1776, and try to appreciate just to what stage the British constitution had arrived, it will be found that the struggle in Great Britain to that date, had been a struggle between "the individual" and "the State." That question had been finally settled, and the individual was protected by, and subject only to, the law of the land, and the despotism of discretionary government was forever abolished. Next in order came the question of "local" self-government (*c*). In compact Eng-

(*c*) The federal idea is really nothing more than the logical outcome of the "individualistic" idea, which lies at the bottom of self-government; and it would be an interesting task to trace the growth of the idea from its root in the belief that man has certain "natural rights," and that society controls his exercise of those rights, only to the extent necessary to give proper play to the like rights of his fellow-men, up through the growth of municipal self-government to the establishment of a federal system of government, logical from root to topmost branch.

land, the question had not become one of practical politics (the Irish question was not then on the carpet), but as to the government of the colonies, it loomed up larger and larger as the colonies increased in population; and the loss of the Southern half of this continent is standing proof of the failure of English statesmen of those days, to grapple with the problem. The thirteen colonies, mutually independent, having joined to destroy the common tie of subjection to Great Britain, but desiring still to perpetuate their union of race and common interest, had to face the task of forming a central or union government, in such fashion as to reconcile national unity with those ideas of the right of local self-government which had been the cause of their separation from the Empire. Schooled by the failure of the "Articles of Confederation" to work this result, they formulated the "Constitution of the United States," under which they have lived and thrived for over one hundred years (*f*). That which, by revolution and a formal written convention, they accomplished, is now working its way out in the colonial system of the British Empire. To-day, the right of local self-government in the British colonies depends on the "conventions, usages and understandings," recognized and acted upon by the statesmen who, throughout the Empire, are at the head of public affairs. The maintenance of national unity is legally with the government of the United Kingdom, but there are not wanting signs of a desire for a system of true Federal government, in which, as to matters of Imperial concern, the whole shall govern the parts, and not one of the parts the whole.

Viewed then as an Imperial system, the British constitution does not differ in principle from the constitution of the

(*f*) "I think and believe that it is one of the most skilful works which human intelligence ever created; is one of the most perfect organisations that ever governed a free people. To say that it has some defects is but to say that it is not the work of Omniscience, but of human intellects."—*Sir John A. Macdonald*, Confed. Deb. p. 82.

United States. In the one, by the written *law* of the constitution, in the other by the unwritten "*conventions*" of the constitution, the field of governmental action is divided, and in each there exists a "national" government, charged with matters of common concern to the whole nation, and "local" governments, charged with matters of local concern to the inhabitants of each of the territorial divisions of which that nation is composed. The fact that the "national" government of the British Empire, is also the "local" government of one of the territorial divisions of the Empire, is an anomaly which will no doubt disappear, but which makes no difference in principle. Although the parliament of the United Kingdom is the supreme power in government under the British constitution, there is a clear and even legal distinction between the exercise of its authority as an Imperial parliament, and the exercise of its authority as the parliament of the United Kingdom. *Prima facie*, it acts as the latter, and there must be "express words or necessary intendment" in order to make its acts truly imperial—it must, in other words, act deliberately and with intent, when it would convert itself (so to speak) into the legislative organ of the Empire (*g*). So that if it be said that the parliament of the United Kingdom is supreme throughout the Empire, it can with equal truth be said, that in affairs truly Imperial, that parliament speaks the will, or what it deems to be the will, of the whole body of the people of the Empire.

The British Empire is scattered over the whole earth, and in the practical work of government, matters of common concern are few and far between—much more so in fact than is commonly imagined. Take, for example, all that class of matters dealt with by the British government under the head of Foreign Affairs. The vast majority of these matters cannot be said, in any practical sense, to be Imperial —of *common* concern to the Empire—relating largely, as

(*g*) See *post*, Chap. IV.; 28 & 29 Vic. c. 63 (Imp.); also Chap. IX., *post*.

they do, to the intercourse between Great Britain and her European neighbors *(h)*; and, as to these, the British Government can hardly be said to act as an Imperial government. Their recognition as matters largely of "local" concern to Great Britain, is made apparent in the case, for instance, of many British treaties, by the reservation to the colonies, in a number of modern instances, of the right to share, or to decline to share, the benefit and burden of these treaties just as each colony may see fit to determine for itself. Modern constitutional usage in the British Empire is rapidly approaching the point where, in matters concerning the colonies in their general relations between themselves *(i)*, or the relations of the colonies generally with foreign powers, the will of the colonies concerned is given effect to, unless the will of the Empire as a whole should differ therefrom, and where in matters concerning the relations of the colonies to the Mother Country, those relations are settled by agreement as between independent negotiators.

In truth, the constitution of the Empire is as truly federal as is the constitution of the United States. Owing to the historical accident that the Empire is but the expansion of the population of the United Kingdom, the "local" government of the original parent stem has hitherto continued to be, as we have said, the "national" government of the Empire, but by gradual modification, by conventions and usages, the functions of the British Parliament, so far as it controls the "national" government of the Empire, are performed according to the will of the Empire. The true federal idea is clearly manifest—to reconcile national unity

(h) The very fact that different parts of the Empire lie contiguous to different foreign powers will, perhaps, necessitate the enlargement of the sphere of local self-government in the units of the British Confederation that is to be; or, from the other view, the matters of common concern will necessarily be fewer, and the sphere of the "central" government narrower than is the case in a compact territory like that of the United States.

(i) The B. N. A. Act deals with such matters.

with the right of local self-government—the very same idea that is stamped on the written constitution agreed upon by the people of the United States. The difference of position historically is quite sufficient to account for the difference of position legally. Given the independent self-governing communities, which made up the American Commonwealth, the "national" government was super-imposed to secure unity, but upon conditions preservative of local autonomy. With us, on the other hand, the central government stands historically first, but the various communities which grew out of it have, by gradual concession, secured at least as full a measure of the right of local self-government as is enjoyed by the individual States, which together form the neighboring Republic. The sum total of conceded power at any given period, will be found to be commensurate with the opinion prevalent at such period as to the proper line of division between Imperial and local concerns.

It may, perhaps, be contended that the "national" government of the British Empire, having the power to lay down the line, which is to be the legal line of division between matters of common and matters of local concern, at just such a point as to it seems proper, differs in this respect from the "national" government of the United States. The common description of the Federal government of the United States, as a government possessed of specially delegated powers only, would seem to support this distinction. But, in truth, this special delegation is, for all practical purposes of government, a delegation of power sufficiently wide to enable the Federal government to be itself the regulator of its own sphere of authority. The subject matters are themselves comprehensive in scope, and the "implied power" which Congress possesses to choose such means as it may deem necessary and proper for carrying out the designed end of the "national" government, leaves the decision as to the line of division between Federal and State matters very much in Congress' hands;

and thoughtful American writers are not slow in asserting that Congress is as fully the supreme power in the American political system as is the British Parliament in our Imperial system *(j)*. But however this may be, and even if we must go back to "We, the people of the United States" as the supreme power in the American system, we shall find, as might be expected, that the people, as a whole, are legally the rulers of the people in parts, and that the line of division which shall, at any moment, separate the fields of Federal and State action, depends not on the will of the individual States, but on the will of "the people of the United States"—the authors of the "Constitution" as it exists to-day—who can alter it at any time and make it conform to their will. Cumbersome we may think the machinery provided for effecting any desired amendment; but it is there; and no one can say that the next amendment will not be a simplification of the machinery for amendment.

Having shown the presence of the Federal principle in the British constitution, it must be admitted that the constitution of the United States, century-old as it is, carries that principle into action much more logically than does the British constitution of to-day. Were it not for the fact to which we have alluded, namely, that the matters of common concern, requiring governmental action, are few, the British Empire would not long hang together in its present hap-hazard form of federal government. The want of legal limit to the power of the "national" government, does not make itself seriously felt, owing to this scarcity of matters of common concern, and to this further fact, that the statesmen at the head of the British government have, in the main, carefully observed the "conven-

(*j*) Prof. Woodrow Wilson, in "Congressional Government" 4th ed.: "For all practical purposes, the National Government is supreme over the State Governments, and Congress predominant over its so-called co-ordinate branches": p. 52. See, however, a criticism of this work by Mr. A. Lawrence Lowell in his "Essays on Government," p. 46 *et seq.*

tional" limits, and have, in those few matters of common concern, endeavored to carry on the Imperial government in accordance with the wishes of the Empire as a whole, so far as, under our illogical system, those wishes are capable of being ascertained.

We have spoken of the want of legal limit to the power of the "national" government under the British Imperial system. The expression is perhaps hardly accurate—the want which really exists is the want of legal limit to the *legislative power of the British parliament.* The result is that the legal line of division between the fields of Imperial and colonial government, is a most uncertain one, although becoming less so. But although one must ransack both British and colonial statutes to ascertain this line, it is, when ascertained, and at any given moment of time, a legal line of division, and governmental action will be kept by the courts within its proper sphere. No judge within the Empire can legally limit the British Parliament as a legislative body, or treat its enactments as *ultra vires;* but the very same thing may be said of that "amended Act" of the supreme legislative authority of the United States—its present "Constitution"—or of any future amendment thereof. But under both the British and the United States systems—systems of government-according-to-law—the courts charged with the enforcement of *law* must decline to recognize the validity, the lawfulness, of any governmental act, done by any person or body of persons, beyond the limits to which they are legally subject.

The enforcement by the courts, colonial and British, of the legal limitations upon colonial legislative power, is matter of legal notoriety (*k*), apart altogether from the cases which have arisen relative to the division of the field of Canadian government between the Dominion and Provincial legislatures; and no less notorious is, or should be, the enforcement by the courts, of the legal limits set to

(*k* See *post*, Chap. IX.

governmental interference (other than by Imperial law-making) on the part of the "national" authorities with colonial rights of self-government (*l*). The "sphere of authority" of the British parliament, *as a law-making body* for the Empire, is legally unlimited, and within that unlimited sphere it may exercise its law-making powers in whatever fashion may appear proper to it. The "sphere of authority" of Congress as a law-making body is not unlimited, but over matters within that sphere (be it wide or narrow), the power of legislation is plenary, and subject to no limitations capable of judicial enforcement.

We have not therefore discovered yet the difference in principle between the British and the American systems of government. It is not in respect of the federal idea—that is common to both; nor in respect of the rule of *law*, the enforcement by the courts of the law of the constitution—that, too, is common ground. We are driven, therefore, to examine the *machinery* of government; and here we shall find a difference which runs through the "national" and "local" governments alike of these two systems. The difference in principle is not in those parts of the body politic which exercise legislative functions, nor in those which are executive, but in the connection between the two—the connection between the law-making and the law-executing departments of government.

It must appear clear, upon consideration, that in any country under the rule of law, the body to which by the constitution is entrusted the power to make law, must necessarily be the supreme power in government. The body to which the executive functions of government are entrusted must obey the law, and the extent of its power to exercise its own volition entirely depends on the legislative body. That body may content itself with enacting general laws, laying down broad principles, or giving general directions in reference to government, and in such case

(*l*) Campbell v. Hall, Cowp. 209.

the choice of means, manner, and time, left with the executive, constitutes that executive a power capable of exhibiting the imprint of its own *discretion* in the actual carrying on of public affairs. On the other hand, the legislature may go to such length of legislative detail, may so specifically provide the means, manner, and time, for the performance of any work of government, that the executive may sink to the level of a purely routine office, and the power of any member of the executive staff to exercise discretion, as to how or when he shall perform his duties, be entirely taken away. The history of constitutional progress in England is the history of the steps by which the Legislature compelled the Executive to recognise the supremacy of law—in other words, the supremacy of the Legislature; and so long as the Executive withheld this full recognition, legislation continued to be more and more specific in its provisions, more of a curb and fetter upon executive discretion. But now that the principle of executive responsibility is recognized to the full, the tendency of legislation is, in many matters, rather the other way; and many details of governmental action are left to be provided for by order in council or departmental regulation, or even left to the discretion of the official who has charge of the particular work.

It must be observed, too, that this supremacy of the legislative department of government is just as clearly apparent under a federal system where the government is a government-according-to-law, as under what has been called a "unitarian" system, under the like rule of law. The federal idea has no more necessary relation to the separation of the spheres of authority of the legislative and executive departments than has the "unitarian" idea. The English constitution (viewed as the constitution of the United Kingdom merely) and the French constitution are manifestations of the "unitarian" idea in government; but, in the former, the supremacy of the legislature over the executive is a dominant principle; while, in the latter, the

executive is, in many respects, recognized as above the law, as having a law peculiar to, and moulded by itself—the *droit administratif*—and somewhat the same distinction may be drawn between the two representative federal constitutions, that of the United States and that of the Swiss Republic.

Reasoning, *a priori*, therefore, one would say, that, in both the British and the American systems, the body which makes the law must necessarily be supreme over the body which simply carries out the law when made; and it is not surprising, therefore, to find that in the British system, not only is this supremacy recognized, but, by a certain arrangement of the machinery of government, the will of the law-making body is made to sympathetically affect and control the will of the executive in the administration of public affairs; and the administrative knowledge of the executive is utilized to the full in the work of legislation. The same supremacy necessarily exists in the United States system; that is, the executive department of the Federal government, or of any one of the State governments, must administer public affairs according to law. But, in their system, there seems apparent a determined effort to prevent co-operation and sympathy.

What then is this arrangement of machinery to which we have referred as existing in the British system?

Of late years it has been found necessary to revise somewhat our ideas concerning the British constitution. The older authorities dwell upon the division of power between the legislative and executive departments of government, and the subdivision, in turn, of the legislative department into King, Lords, and Commons; and they (*m*) dilate with quiet enthusiasm upon the "checks and balances" provided in and by such a division and subdivision of power. Gradually, however, this "literary theory," safe-guarding the ark of the constitution with its supposed division of

(*m*) *e. g.* Chitty On the Prerogatives of the Crown, at p. 2.

sovereignty into departments, each, as it were, checking whatever of evil there might be in the uncontrolled action of the others, and yet each supposed to be in a sense independent of the others—gradually, we say, this theory came to be seen to be an incomplete, and, in truth, wholly erroneous explanation of the working of the constitution. The rising spirit of democracy had silently permeated the system of government, without any apparent disintegration of parts, but with a difference in the practical "residence" of power, which at length challenged recognition at the hands of those who would expound the constitution and its law.

Of comparatively recent writers, the late Walter Bagehot, in his most valuable essays, attacks with vigor this "literary theory," with its supposed checks and balances, and as a result of an interesting study of constitutional dynamics, arrives at this conclusion:

"The efficient secret of the English constitution may be described as the close union, the nearly complete fusion of the executive and legislative powers. No doubt by the traditional theory, as it exists in all the books, the goodness of our constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation. The connecting link is *the Cabinet*. By that new word we mean a committee of the legislative body selected to be the executive body. The legislature has many committees, but this is its greatest. It chooses for this, its main committee, the men in whom it has most confidence. It does not, it is true, choose them directly; but it is nearly omnipotent in choosing them indirectly. . . . . The Cabinet, in a word, is a Board of Control, chosen by the legislature, out of persons whom it trusts and knows, to rule the Nation. . . . A cabinet is a combining committee—a *hyphen* which joins, a *buckle* which fastens, the legislative part of the State to the executive part of the State. In its origin, it belongs to the one, in its functions, it belongs to the other."

and he proceeds further to show how, by this practical fusion, this result is clearly attained—that the will of the

people constitutionally expressed through their elected representatives in the House of Commons, controls both the law-making and the law-executing power, and is, in very fact, the ultimate power in government.

Mr. Dicey, in a work to which reference has already been made, treats of 'the *law* of the constitution,' and insists on this as the legal principle discernible throughout, namely, *the supremacy of Parliament*. Viewed as a legal question, the solution of the problem stops short at the expression (in Act of Parliament) of the will of Parliament, and from that standpoint we may summarize the result thus: The Imperial Parliament is supreme over the Executive. By the legal expression of its will in statutory form, it controls the exercise of executive authority; may add to, or take from, the power of that department of government, or may subject the exercise of executive power to such conditions of time, place, or manner of action, as to Parliament may seem proper. The law of the constitution does, however, take this cognizance of the "power behind the throne," that the method of electing the House of Commons is provided for by Act of Parliament.

Viewed in the light of the "conventions of the constitution," the responsibility of the executive to the legislature for the proper performance of its functions, is guaranteed by those usages and precepts, that code of "conventions" which provide that, upon losing the confidence of the House of Commons, the Cabinet must resign, and give place to an executive which will command that confidence (*n*).

This responsibility of the executive to the people, through the House of Commons—the elective branch of parliament—is the principle of the British constitution,

(*n*) The last chapter in Prof. Dicey's book is a very interesting effort to show that the "conventions" of the British constitution rest upon a basis of *legal* sanction—that the violation of most, if not all, of those conventions, will speedily place the offender in the position of a law-breaker. This idea could hardly be worked out in the matter of the "conventions" as to colonial self-government.

and is worked out in government somewhat upon the principle of the endless chain. Travelling in one direction along the links of this chain, we find an executive committee, practically appointed by, and subject to deposition at the hands of the Commons, executing upon and over the governed those laws of the land which are made, or allowed to remain such, by that branch of parliament which is elected by the people through certain executive machinery appointed by parliament, and put in motion by the executive committee. A reversal of the process leads to the same result—the discovery that the motive power in government is the will of the people, and that this power works always and only *through parliament*, but that, through the controlling branch of parliament, the governed make their own laws, and provide the means, and regulate the manner, by and in which they are to be governed by those laws.

Turning now to the system of government across the border, we find the same principle of ultimate responsibility to the people; but it is worked out in a very different and much less satisfactory way. We have referred to the "literary theory" of the English constitution. It is not very far from the truth to say that the United States system is an attempt to work out that very theory in actual practice. We may take as our example the "national" government at Washington, for, as we have already said, the type is persistent throughout both the "national" and the "local" governments of the American Union, just as the British type is persistent throughout both the "national" and "local" governments of the British Empire. How it came about that the "literary theory" of the English Constitution was embodied in the Constitution of the United States has been the subject of frequent enquiry, and we venture to quote from a recent American work of great merit:

"The Convention of 1787 was composed of very able men of the English-speaking race. They took the system of government with which they had been familiar, improved it, adapted it

to the circumstances with which they had to deal, and put it into successful operation. . . . . It is needful, however, to remember in this connection, what has already been alluded to, that when that Convention was copying the English constitution, that constitution was in a stage of transition, and had by no means fully developed the features which are now recognized as most characteristic of it. . . . . The English constitution of that day had a great many features which did not invite republican imitation. It was suspected, if not known, that the ministers who sat in parliament were little more than the tools of a ministry of Royal favorites, who were kept out of sight behind the strictest confidences of the Court. It was notorious that the subservient parliaments of the day represented the estates and the money of the peers and the influence of the King, rather than the intelligence and purpose of the Nation. . . . . It was something more than natural that the convention of 1787 should desire to erect a Congress which would not be subservient, and an executive which could not be despotic; and it was equally to have been expected that they should regard an absolute separation of these two great branches of the system as the only effectual means for the accomplishment of that much desired end" (o).

Prof. Wilson, indeed, shows very clearly, as one would expect, that Congress is now supreme over the executive of the federal government, and "subjects even the details of administration to the constant supervision, and all policy to the watchful intervention of the Standing Committees of Congress"; but he laments the lack of executive responsibility to Congress. The President and the heads of the chief executive departments of government stand apart, isolated from Congress; bound to execute its laws, but with no greater influence in securing the passage of laws in aid of effective administration, or in preventing the passage of laws which may hamper administration, than is possessed by any other private citizen. By the terms of the "Constitution" itself, they are debarred from seats in

(o) Wilson's Congressional Government, p. 307.

Congress (*p*), and so have no initiative in legislation. On the other hand, Congress must go to the full extent of law-making in order to exercise its supremacy over the executive; but the trouble may be, not in the law, but in the execution of that law, and no matter to what extent of detail the law may make provision, one may expect that an executive, perhaps completely out of sympathy with the law, will not be a very satisfactory administrator of that law. In short, there is no guarantee of that harmony between the legislative and executive departments, that sympathy and co-operation, without which there must necessarily arise constant friction, lack of continuity in policy, and even a deadlock in the administration of public affairs. Congress and the executive are responsible, each directly to the people; but the retention of the confidence of Congress is in no way a condition to the retention of office Congress has no such power to depose the executive as has the House of Commons in the English constitutional system. Moreover, the constant possibility of party diversity between the Executive and Congress, renders it very difficult to fasten responsibility upon either. This difficulty is thus strongly put by Prof. Wilson, in the work from which we have already quoted:

"Is Congress rated for corrupt, or imperfect, or foolish legislation? . . . . Does administration blunder and run itself into all sorts of straits? The Secretaries hasten to plead the unreasonable or unwise commands of Congress, and Congress falls to blaming the Secretaries. The Secretaries aver that the whole mischief might have been avoided, if they had only been allowed to suggest the proper measures; and the men who framed the existing measures, in their turn, avow their despair of good government, so long as they must entrust all their plans to the bungling incompetence of men who are appointed by, and responsible to somebody else. How is the school-master, the nation, to know which boy needs the whipping?" (*q*).

(*p*) Art. I., sec. 6. (*q*) Congressional Government, p. 283.

In the preface to the same work, the distinction between the British and the American systems of government is shortly stated, in language which we have no hesitation in adopting.

"It is our legislative and administrative machinery which makes our government essentially different from all other great governmental systems. The most striking contrast in modern politics is not between Presidential and Monarchial governments, but between Congressional and Parliamentary governments. Congressional government is *Committee* government; Parliamentary government is government by a responsible *Cabinet ministry*.

"These are the two principal types which present themselves for the instruction of the modern student of the practical in politics: administration by semi-independent executive agents, who obey the dictation of a legislature to which they are not responsible; and administration by executive agents, who are the accredited leaders and accountable servants of a legislature virtually supreme in all things."

Neither need we hesitate to give expression to our decided preference for the system of cabinet government which obtains in England, when we find so thoughtful a writer as Prof. Wilson—a citizen of the Republic at that—doing the like.

After this comparison of the two leading types of Anglo-Saxon self-government, it is easy to decide to which the Canadian constitution conforms.

We shall have occasion to again refer to the limits set to our right of self-government, by reason of our colonial subjection to the ultimate supremacy of the Imperial parliament. In this chapter, we have endeavored to show that this subjection is but that subordination of a "local" to a "national" government, essential in any truly federal scheme of government. If, indeed, to establish our position, we must show that some one parliamentary body, elected by a Canadian electorate, is possessed of the ultimate sovereignty in Canada over every conceivable subject

matter of governmental action, the discussion need go no further; for, admittedly, we are a colony of Great Britain, and in the ultimate legal analysis our government is from without. This, however, is not, we take it, the point of distinction.

If we can show that so far as the right of local self-government—the right to make the laws by which we are to be governed, and to execute those laws as suits ourselves—has been conceded, our power is exercisable, the law-making power with the same efficacy, and the law-executing power, under the same principle of responsibility to parliament, and, through parliament, to the electorate, as in the United Kingdom, we shall have established our proposition.

To any one who has knowledge of the constitutions of the provinces prior to confederation, it is unnecessary to point out, that since the concession of "Responsible Government," and up to 1867, those constitutions were "similar in principle to that of the United Kingdom," and that all that has been said in reference to the British constitution might be repeated in reference to (old) Canada, Nova Scotia, and New Brunswick.

Nor will it be contended that, under the B. N. A. Act, the sum total of our rights of self-government has been lessened; in fact, as we shall have occasion to show, that sum total has been largely increased, both legally and by "conventions." And no one who knows the actual working of the machinery of government in Canada, will contend that we have, either in the Dominion government, or the government of the various provinces, other than a parliamentary government.

It has been usual to speak of "the division of power" under a federal system. In truth, this form of expression is most inapt, and very inaccurately describes the division of labor which really exists. Its thoughtless use has been fruitful of much misconception of the true line or principle

of division. Bearing in mind what is involved in the term government—law-making and law-executing—and the co-extensive and complementary spheres of action of these two chief departments of government, we shall find that there is, in our system, no "division of *power*" in the sense in which such division was, by the older writers, erroneously assumed to exist under the British form of government; and certainly none in the sense in which such division does actually exist in the individual systems of the United States. Our simile of the endless chain may, perhaps, serve to impress the true principle of our form of government upon the reader, and that principle underlies the practical working of each and every of our governmental organizations, Dominion and Provincial.

The true line of division is this: The various subject matters, with which government can be supposed to have anything to do, are divided into two great divisions *(r)* —matters of general and matters of local concern—but to each of such divisions, the full equipment of power, legislative and executive, is given. There is no division of function in the sense that as to any given subject matter, legislative power resides in one organization or government, and executive power in another; as to any given subject matter, the full power of government rests in one and the same governmental body. The Dominion government and the Provincial governments are (each within the sphere of its legitimate operation) carried on, on the same principle as the government of the United Kingdom. Jurisdiction as to subject matter conceded, the will of the legislature, Dominion or Provincial, is supreme over the executive, in the same sense as the will of the Imperial parliament is supreme over the executive in the United Kingdom. The legal principle, so strongly insisted upon by Mr. Dicey—the supremacy of parliament—as clearly appears here as in the United Kingdom; while, for the "conventional" aspect of the

(r) See Bank of Toronto v. Lambe, 12 App. Cas. 587, and *post*, Chap. X.

question, it is only necessary to carry the comparison one step further, and point out that, as in the United Kingdom, so here, the ultimate responsibility of the executive to the electorate, through the elective branch of the legislature, is clearly established, in relation as well to each provincial as to the Dominion government. The elective branch of the legislature (Dominion Parliament or Provincial Legislative Assembly) represents, and is directly responsible to, the electorate—as in the United Kingdom. The Executive Committee (the cabinet) composed of members of the legislature, holding their positions by virtue of, and contingently upon, the retention of the confidence of the elective branch of that Legislature, are therefore, practically directly responsible to that elective branch—as in the United Kingdom. The same chain of connected relation, the same source of motive power, and the same method of applying that power to the work of government, exists in each of our governmental bodies, as in the United Kingdom.

In this view of the Canadian constitution, the extent to which the executive department of the Dominion government may exercise, over Acts of the provincial legislative assembly, the power of disallowance, will appear quite immaterial when it is borne in mind that this power is, in any given case, exercised under the same responsibility (directly to the Dominion parliament, and indirectly, through the elective branch of that parliament, to the electorate) as exists in relation to the exercise of any other executive power lodged in the hands of the Dominion government. And so as to any other points of contact, or even conflict, between the Dominion and Provincial governments—or, for that matter, between two local governments—for its conduct with regard to such matter of contact or conflict, for its action or inaction, each government (executive and legislative department alike) is responsible ultimately to the electorate, who condemn or approve in the very same way and with like results as in the case, for

example, of a conflict between Lords and Commons in the United Kingdom.

Nor would it make the slightest difference, if (as was held in certain quarters, for some years after 1867,) concurrent power over many subject matters were, by the B. N. A. Act, allotted to both the Dominion and Provincial governments, and if the true construction of that Act were, to subordinate provincial legislation upon such matters, to Dominion legislation thereon. Colonial legislation is completely subordinate to Imperial, and to the extent of its "repugnancy" to such Imperial legislation, is utterly void; and yet no one, we fancy, would contend that, by reason of such subordination, the constitutions of the pre-Confederation provinces, for example, were other than constitutions similar in principle to that of the United Kingdom. The sphere of their power of government was limited by reason of their colonial status, but so far as they had power, that power was exercised through the same medium of responsible parliamentary government. And so now, under the B. N. A. Act, each government, Dominion or Provincial, has limitations set to its sphere of operation, but each, within its sphere, is a responsible parliamentary government.

CHAPTER II.

THE PRE-CONFEDERATION CONSTITUTIONS.

To properly appreciate the merits or accurately note the defects of any form of government, it must be studied in its actual present working—examined, so to speak, in motion—and if the B. N. A. Act were the creation of a governmental organism, new in all its parts, we might lack justification for indulging in historical retrospect back of 1867. But, just because the slate was not cleaned, just because many parts of the machinery of government existing in the provinces prior to Confederation were continued in the new plant set up in the various provinces, it will be necessary to examine the earlier constitutions of those provinces. Indeed, it will appear that in at least two of them, New Brunswick and Nova Scotia (*a*), the governmental machinery was left by the B. N. A. Act almost intact, and new plant was provided only for the Dominion government and the provinces of Ontario and Quebec (*b*). These reasons, here urged in brief, will develop themselves more at length as we progress in our examination of the scheme of government contained in the B. N. A. Act. To avoid undue repetition, the proof must be somewhat delayed. In any case, a short historial retrospect would probably not be considered out of order.

(*a*) The same remark applies to British Columbia and Prince Edward Island upon their admission to the Dominion.

(*b*) And afterwards for Manitoba and the North West Territories.

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

To NOVA SCOTIA belongs the distinction of being the oldest of the B. N. A. colonies now forming part of the Dominion. The preamble to one of the earliest Acts (*c*) of the Nova Scotia Assembly (1759), declares that "this province of Nova Scotia, or Acadie, and the property thereof, did always of right belong to the Crown of England, both by priority of discovery and ancient possession." The correctness of this declaration, France would probably not admit; but the contest would be of antiquarian interest merely, for by the treaty of Utrecht, in 1713, "Nova Scotia, or Acadie, with its ancient boundaries," was ceded by France to the Crown of England in the most ample terms of renunciation. Nova Scotia, as thus ceded, included the present provinces of Nova Scotia (excluding Cape Breton) and New Brunswick, and also part of Maine. For many years after its acquisition, Nova Scotia was practically under the military rule of a governor and council, whose authority was defined in the governor's commission. In 1749, a colonization scheme was set on foot, and anticipating an influx of settlers into the colony, the commission to Governor Cornwallis, of date 1749, authorized the summoning of "general assemblys of the free-holders and planters within your government, according to the usage of the rest of our colonies and plantations in America." After much delay, and the exhibition of much unwillingness on the part of the governor and his council to act upon this direction, a scheme of representation was settled, and the first parliament of Nova Scotia met on the second of October, 1758, at Halifax.

(*c*) 33 Geo. II. c. 3 (N. S.).

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

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

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

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

So far as the Maritime Provinces (*e*) are concerned, the legislatures of to-day, in those provinces, are the lineal descendants of those early "general assemblys." But, as we must show, the sphere of their authority in government, in 1867, when Nova Scotia and New Brunswick (*f*) became part of the Dominion of Canada, was very different from their sphere of authority in 1758, and for many years thereafter.

QUEBEC—not the present province of that name, but practically the now provinces of Quebec and Ontario—was

(*d*) They are set out at length in 5 Moo. P. C. 259: *In re* The Island of Cape Breton.

(*e*) The documents relating to the early constitutions of the Maritime Provinces are set out in Return No. 70, Can. Sess. Papers, 1883.

(*f*) And so as to Prince Edward Island in 1873. See *post*.

ceded to Great Britain by the same treaty of Paris, which secured Cape Breton and Prince Edward Island. The proclamation (*g*), to which we have already referred, which followed upon the cession, simply annexed Cape Breton and Prince Edward Island to the government of Nova Scotia, but erected Quebec into a new province, and made provision for its government. Both by that proclamation, and by the commission to Governor Murray, the institution of a representative assembly was contemplated, but, for reasons upon which it is unnecessary to enlarge, no such assembly ever met thereunder; and it was not until after the Imperial parliament intervened (for the second time) in the government of the B. N. A. provinces—after the passage of what is known as "The Constitutional Act, 1791" (*h*), dividing Quebec into the two provinces of Upper and Lower Canada, and providing for a separate legislature in each province—that such assemblies met; that of Upper Canada, at Niagara, on the 17th of September, 1792, and that of Lower Canada, at Quebec, a few months later. In 1840, the two provinces of Upper and Lower Canada were, by what is commonly known as "The Union Act" (*i*), joined together in a legislative union, which lasted until the birth of the Dominion (*j*).

We must now retrace our steps, in order to take a comprehensive view of the nature of the government which was established in the various provinces; and, in taking such a view, it will be, to say the least, convenient to treat of the statutory constitutions of the Upper Provinces separately, and to confine our attention, in the first place, to the constitutions established (in the exercise of the prerogatives of the Crown) by means of the commissions and proclama-

(*g*) See Houston, Constitutional Documents of Canada, p. 67.

(*h*) 31 Geo. III. c. 31 (Imp).

(*i*) 3 & 4 Vic. c. 35 (Imp).

(*j*) We defer consideration of the constitution of British Columbia and of Manitoba and the North West Territories until a later stage. See *post*.

tions, to which we have referred. We may say at once that, along both lines, this survey is undertaken in order to show that, prior to the date of Confederation, the Imperial government had, in a tangible way—evidenced partly by dispatches, partly by instructions, partly by statutory enactments, partly, perhaps, by long disuse of power along certain lines—put upon record their recognition of the necessary connection which must exist between the legislative and executive departments of government, as well in the case of a colony as in the case of the United Kingdom.

As a preliminary to this survey, it is almost indispensable that we should again refer to what was, in the latter part of the eighteenth and the earlier decades of the nineteenth century, the accepted explanation of that scheme of government known as the "British Constitution." In those days, the chief commendation bestowed on that constitution was on account of the complete separation, as was supposed, of the legislative and executive power—legislative supremacy in the parliament, executive supremacy in the Crown. Opportunity for interference by parliament to control and regulate executive action, was largely the result of the financial necessities of the executive head of the nation; but, to the extent to which the revenues of the Crown rendered that executive head independent of parliament, the government of the nation was frequently carried on without that body being summoned together. How the change was gradually brought about, until now the supremacy of parliament over the executive, is a clearly established principle of the British constitution, it is beyond the scope of this work to trace (*k*); but, shortly stated, it would appear to have been effected by the judicious use of the power over the purse strings, in order to secure the consent of the Crown to the relinquishment to parliament of the most important, if not the most numer-

(*k*) See May's Const. Hist., Vol. ii. p. 89.

ically, of those 'common law' powers of the executive known as "the prerogatives of the Crown." But, at the time of which we write, the government of Great Britain was, to an extent very much larger than at present, carried on by the exercise of these prerogatives—that is to say, was largely an executive government—and of no department was this more true than of the colonial, "the Board of Trade and Plantations." The very facts to which we have alluded—that for very many years after the settlement of Nova Scotia (practically until the B. N. A. Act), no legislative interference by the Imperial parliament, in the government of the Maritime Provinces, took place—that provinces were enlarged, divided, joined, all without Act of parliament—and that, without Act of parliament, representative assemblies were established therein—make manifest the extent to which the government of the early provinces was in the nature of executive government, by prerogative. And yet not entirely so, for in the celebrated case of Campbell v. Hall (*l*) involving a consideration of the proclamation of 1763 (in its relation to Grenada), it was decided by Lord Mansfield, that, although on the acquisition of new territory by conquest or cession, the Crown, without parliament, may make laws for the government of the conquered or ceded territory (*m*), nevertheless, on the grant to the inhabitants of the right to make laws in and by a representative assembly, the prerogative right of the Crown to make laws in respect of the internal government of the colony is forever gone, and that, thereafter, the Crown stands in the same relation to the representative assembly of the colony as in England to the Imperial parliament; and any withdrawal of the colony's right to make laws can only be effected by the Imperial parliament (*n*).

(*l*) Cowp. 204.

(*m*) This was one of the prerogatives annexed to the Crown as commander-in-chief—a right arising by conquest.

(*n*) See *post*, Chap. VI.; *In re* Lord Bishop of Natal, 3 Moo. P. C. (N.S.) 148.

So far, however, as related to the executive functions of government—the administration of public affairs, the execution of the laws of the colonies (whether imposed by imperial or colonial legislative authority), the collection and expenditure of the public revenues, and the appointment and control of the executive officials necessary to these ends—the theoretical independence of the executive, which, as we have shown, obtained in England, was carried to its practical result in the work of government in the colonies. Theoretically and, indeed, legally, the executive head of the nation, by virtue of its position as a constituent branch of parliament, could prevent encroachment by the legislature upon the prerogatives of the Crown—that is, upon the executive department of government—but the financial necessities of the executive in England, gradually led, as we have before observed, to the surrender to parliament, or at least to parliamentary control, of the entire executive government of the nation. The Crown occupied, in the colonies, the same position as a constituent branch of the legislature of a colony, but the financial necessities of the executive government were, in these early days of our colonial history, so largely met by the revenues arising from the sale of the Crown lands, fines, tolls, and other royalties of various sorts, and, for the balance, provided for in the Imperial budget, that the executive of a colony was to a large degree independent of the colonial assembly.

That the early "assemblys" of the provinces were intended to be confined to purely legislative work, and that, in the doing of it, they were not to interfere in the executive government of the colony, is apparent when we come to study somewhat more closely the commissions of the early governors—which were in truth the charters of government in those provinces.

There is no essential difference in the terms of the commissions to Governor Cornwallis (Nova Scotia), Governor Patterson (Prince Edward Island), Governor Carleton (New

Brunswick), and Governor Murray (Quebec); and we therefore take for comment the first commission which conveyed authority to summon an assembly in the provinces now forming part of the Dominion—that to Governor Cornwallis (*o*), of Nova Scotia. "For the better administration of justice, and the management of the public affairs of our said province," the governor was authorized to appoint "such fitting and discreet persons as you shall either find there, *or carry along with you*, not exceeding the number of twelve, to be of our council in our said province. As also to nominate and appoint, by warrant under your hand and seal, all such other officers and ministers as you shall judge proper and necessary for our service, and the good of the people whom we shall settle in our said province until our further will and pleasure shall be known." Subsequent appointments to fill vacancies in the council were to be made by the authorities *in England*. With the advice and consent of this council, the governor was empowered to establish courts of justice, and to appoint all the necessary ministerial and judicial officers in connection therewith. The public revenue was to be disbursed by the governor's warrant, issued by and with the advice of the council, with this limitation, however, that it was to be disposed of by the governor "for the support of the government, and not otherwise." It is hardly to be wondered at, having in view the mode of appointment, and of filling vacancies in this council, that the executive government of those days came to be designated by the familiar phrase—"the family compact."

Turning now, to the part played in government by the assemblies, and referring again to the commission to Governor Cornwallis, we find him commanded to govern the colony according to his commission, the instructions therewith, or to be thereafter given (from England, of course), "and according to such reasonable laws and statutes as

(*o*) Houston, Const. Documents, p. 9.

hereafter shall be made or agreed upon by you, with the advice and consent of our council and the assembly of our said provinces."

The legislative power of the governor and assembly, is in terms ample: "To make, constitute, and ordain laws . . . . . for the publick peace, welfare and good government of our said province . . . . . and for the benefit of us, our heirs, and successors; which said laws are not to be repugnant but, as near as may be, agreeable to the laws and statutes of this our Kingdom of Great Britain." All such laws, however, were subject to disallowance by the Imperial authorities, with no limitation as to the time within which such disallowance should take place.

We shall have occasion to refer to the position of the Crown as a constituent branch of the Imperial parliament and of colonial assemblies, but the clause providing for this in the commission now under examination, is noteworthy for the frank and undisguised fashion in which it discloses the reason. This clause is as follows:

"And to the end that nothing may be passed or done by our said council or assembly to the prejudice of us, our heirs and successors, we will and ordain that you, the said Edward Cornwallis, shall have and enjoy a negative voice in the making and passing of all laws, statutes, and ordinances, as aforesaid."

The importance of the concession to the early provinces, of the right to frame the laws by which, in local matters, they were to be governed, must not be under-rated. If it cannot be considered as in any fair sense a concession of the right of self-government, it must at least be admitted that it fell short, only because of the theory which then obtained, of the independence of the two departments of government, and because of the inability of the legislative bodies in the colonies to withhold supplies until grievances in the executive department were remedied.

We now proceed to Quebec, in order to examine the changes in the form of government, introduced there by

Imperial statutes. For eleven years after the Treaty of Paris, the commission to Governor Murray and his successors (read with the proclamation of 1763), was the charter of government; but, as we have already noticed, no assembly ever met in that province, and any legislation which was considered necessary was passed by the governor and his council. Owing to the discontent of the inhabitants, then largely French, at the introduction (which was claimed to have taken place) of English civil law, and owing perhaps to a doubt of the legality of the ordinances of the governor and his council, "The Quebec Act, 1774" (*p*), was passed by the Imperial parliament. Of this statute, it is necessary to make here only this note, that it revoked the right to a representative assembly, and lodged both departments of government, legislative and executive, in the hands of the governor and his council; with this provision, however, that the members of the council were to be appointed from the inhabitants of the province. A perusal of the Act discloses much milder checks on the legislative power than in the case of the earlier commissions;—no doubt because of the union of the legislative and executive powers of government in the same hands (*q*).

By "The Constitutional Act, 1791"—the province of Quebec having been divided by royal proclamation (or rather, the king having signified "his Royal intention to divide his province of Quebec into two separate provinces") —provision was made for the establishment, in each of the two provinces, Upper and Lower Canada, of a legislative council and assembly. Beyond giving the assembly so created, the right to legislate as to time, place and manner

(*p*) 14 Geo. III. c. 83.

(*q*) By the 13th sec. the Governor and his council were expressly prohibited from "laying" taxes or duties within the province, with the exception of local assessments for municipal purposes. By an Act of the same session (cap. 88) provision was made for raising a revenue by means of duties on rum, spirits, and molasses, to be disbursed by imperial officers. See the Act; Houston, Const. Doc. p. 97.

of holding elections to the assembly, and as to the officers by whom such elections were to be conducted (*r*), the Act would, upon cursory perusal, appear to give to the legislature no control over the executive, more than had been conferred on the assemblies in the Maritime Provinces; but there is one most important exception, to which particular attention must be given (*s*).

We have not, of course, overlooked the rule of law, that the consent of the Crown, by its representative in the colony, to any Act of the colonial legislature curtailing the power of the Crown in the exercise of any prerogative right, is as effective to that end as is an Act of the Imperial parliament, in similar case; but by reason of the refusal to concede to the colonies the control of the revenues raised therein, the colonial assemblies were unable to force consent to Acts in curtailment of prerogative. Not being able to starve the executive, they were unable to hold the officers of that department to responsibility for the due performance of their duties; and whether they had the confidence of the representative branch of the legislature or not, was a matter of perfect indifference to these executive officers. The importance, therefore, of this question of revenue and its expenditure—the power to make provision for a revenue and to appropriate it when raised, becomes more and more apparent as we proceed, and the question must now be dealt with.

The treatment accorded by Great Britain to her colonies, in the matter of taxation, was entirely regulated by the view taken in England of the necessities of Imperial "trade and commerce." At first, of course, the expense of governing the colonies was borne entirely by the home government, but as early as 1672 (*t*), the Imperial treasury levied tribute upon the colonies, by the imposition, by Imperial

(*r*) A parliament so firm in its claim to exclusive control over elections, as was the British Parliament at that time, could scarcely have done otherwise.

(*s*) See *post*, p. 39.

(*t*) 25 Car. II. c. 7.

Act, of export duties on certain articles shipped from the colonies for consumption elsewhere than in England; the proceeds of which duties were, of course, a set-off to the expense of government in those colonies. During the century which followed, Imperial Acts were from time to time passed, providing for the collection of both export and import duties, but always as part and parcel of the regulation of trade and commerce (*u*). In 1763, permanent provision was made with regard to these colonial duties, and it was provided that the net proceeds thereof should be reserved for the disposition of the Imperial parliament, "towards defraying the necessary expenses of defending, protecting, and securing the British colonies in America" (*v*).

This, then, was the position of affairs at the time when regular forms of civil government began to be established in Nova Scotia, Prince Edward Island, New Brunswick and Quebec. The abandonment by the Imperial parliament, of the principle that these duties were in the nature of regulations of Imperial trade and commerce only, and the extension of the Imperial power of taxation to matters of excise—to laying tribute, in other words, on internal trade—and the consequent loss of the southern half of this continent, is a familiar story. During the progress of the struggle, but too late to win back the revolting colonies, the Imperial parliament passed the celebrated Renunciation Act of 1778 (*w*), by which it was declared and enacted that "the King and parliament of Great Britain will not impose any duty, tax, or assessment whatever, payable in any of his Majesty's colonies, provinces and plantations in North America or the West Indies; except only such duties as it may be expedient to impose for the regulation of commerce; the net produce of such duties to be always paid and applied

(*u*) 14 Geo. III. c. 88 (noted above) was a "revenue" Act. See *post*, p. 39.

(*v*) See Todd "Parl. Gov. in Brit. Col.," p. 169, *et seq.*

(*w*) 18 Geo. III. c. 12. This Act is, of course, powerless to bind the Imperial parliament; but it is a most emphatic expression of a "conventional" rule to be thereafter followed.

to and for the use of the colony, province or plantation in which the same shall be respectively levied, in such manner as other duties collected by the authority of the respective general courts or general assemblies of such colony, province, or plantation, are ordinarily paid and applied," and this principle was followed until the free trade campaign in England, led to the abandonment of the system of taxing trade for the benefit of trade, and, with it, the regulation of colonial tariffs by Imperial legislation.

During this period, however, the practical result of the colonial system was this. With the exception of such sums as the colonial assemblies were minded to raise (usually by the imposition of customs duties), in order to the carrying on of public improvement and promoting settlement, the revenues which came to the hands of the executive were, (1) the proceeds of customs, excise and license duties, levied under Imperial Acts; and (2) the hereditary, territorial and casual revenues of the Crown, consisting of the proceeds of the sale or lease of the "waste" lands in the colonies, fines, tolls, etc. Over the revenues arising under colonial Acts, the colonial legislatures could, of course, and did insist on retaining power of appropriation, and, so far as these revenues were concerned, could withhold supplies; but their action in such case made no difference to the executive, however it might do harm to the colony. The cost of the administration of justice, and of civil government (including, as it did, the salaries of the entire executive staff, administrative and judicial), was paid out of the other two sources of revenue, and over these the colonial assemblies had for many years no power of appropriation or control. To secure control of the executive—to make them *feel* responsibility—it was indispensably necessary to get control of these revenues and their appropriation; and the history of the growth of the principle of "Responsible government" is the history of the gradual acquisition by the colonial legislatures of the right to appropriate revenue, from whatever source within the

colony arising. The "tenure-of-office" question practically depended upon this question of control over the purse strings.

In all the provinces, the real issue was somewhat obscured by reason of the fact that, under the then arrangement, the legislative council, or second chamber, acted as a shield to the governor and his executive council, and was interposed to bear the brunt of all attacks upon executive methods. In the earlier stages of colonial history, the executive council was really a branch of the legislature, and it always continued potentially so, by reason of its members forming the influential portion of the Crown-appointed legislative council. This position of affairs, however, gave the disputes between the legislature and the executive, the appearance of being disputes between the two branches of the legislature; and it is not surprising, therefore, to find that the efforts of Howe, Wilmot, Papineau, and Baldwin, were directly and ostensibly bent to secure reform in the constitution of the legislative council *(x)*. The real issue, however, was the question of executive responsibility, and, as we have endeavored to point out, that question largely depended upon, and was ultimately solved by, the solution of the more sordid one as to control of expenditure. Perhaps, there was a lack, too, of proper appreciation of the way in which the principle of responsible government was working its way into the fibre of the British constitution—through the medium of cabinet government—and this may have tended to the adoption of the less direct route to the establishment of responsible government here. It needed men like Lord Durham and Charles Buller, who were able to see through the intricacies of governmental machinery and discern the true principle of the British system,

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

to point out how that same principle could be made effective in the colonial machinery of government.

The first concession gained, was of the power of appropriating the proceeds of Imperial tariffs in force in the colonies. As far back as "The Constitutional Act, 1791," this power of appropriation was expressly given to the legislatures of Upper and Lower Canada, over the proceeds of all customs duties levied as part of the commercial policy of the Empire; and this is the point of distinction between the powers of the colonial assemblies under that Act, and under the earlier commissions, to which reference was made a few paragraphs back (*y*). But the only Imperial tariff Act in force in Canada, was the Act of 1774—a *revenue* Act (*z*); and because that Act was contended not to come within the terms of "The Constitutional Act, 1791," express legislation was necessary to give the Colonial legislature control over the revenue arising under that Act. This was obtained in 1831 (*a*).

Still, however, in all the provinces, the "hereditary, territorial, and casual revenues" to which we have referred were amply sufficient to "pay the piper"; and so far as the salaries of all the executive "family-compact" staff were concerned, the legislature had power neither to fix nor withold them. Secure in the enjoyment of the emoluments of office, the executive were able to thwart the wishes of the popular branch of the legislature, and to decline to recognize its right to control or regulate their mode of conducting public business.

The history of the struggles, which in the Upper Provinces culminated at one time in open rebellion, and in all resulted in the firm establishment of Responsible Government, is beyond the scope of this work; but it is curious to

(*y*) *Ante*, p. 35. (*z*) See note *ante*, p. 36.

(*a*) 1 & 2 Wm. IV. c. 23. See Houston 'Const. Doc.' p. 106; Andrew v. White, 18 U. C. Q. B. 170.

note that the contemporary statutory record (*b*) appears in Acts relating to colonial control of colonial finances,—the "tenure of office" question appearing only in the "conventional" aspect of despatches, instructions, etc. (*c*). Not to dwell at undue length upon this point, we may mention shortly, that first to New Brunswick, and afterward to Canada, (1847), and Nova Scotia (1849), full control over the revenues from all sources was conceded; and having that full control, the Legislative Assemblies slowly, but surely, overcame the stubborn resistance, or active opposition of the governors of the early forties, and the principle of executive responsibility was firmly and permanently established in all the pre-Confederation provinces.

We are now, perhaps, in a position to define with some accuracy, the nature of the constitutions existing in the provinces immediately prior to the coming into force of the B. N. A. Act.

What Lieut.-Gov. Archibald has said (*d*) in reference to the constitution of Nova Scotia is clearly applicable to the other maritime provinces: "No formal charter or constitution ever was conferred, either on the province of Nova Scotia or upon Cape Breton while that island was a separate province. The constitution of Nova Scotia has always been considered as derived from the terms of the royal commissions to the Governors and Lieutenant-Governors, and from the "instructions" which accompanied the same, moulded from time to time by despatches from Secretaries of State, conveying the will of the Sovereign, and by Acts of the local legislature, assented to by the Crown; the

(*b*) 1 & 2 Wm. IV. c. 28 (Imp.); 8 Wm. IV. c. 1 (N.B.); 3 & 4 Vic. c. 35 (Imp.); 6 & 7 Vic. c. 29 (Imp.); 6 Vic. c. 31 (Can.); 9 & 10 Vic. c. 94 (Imp.); 9 Vic. c. 114 (Can.); 10 & 11 Vic. c. 71 (Imp.); 12 & 13 Vic. c. (N.S.); 12 & 13 Vic. c. 29 (Imp.); 15 & 16 Vic. c. 39 (Imp.); 17 & 18 Vic. c. 118 (Imp.) See Mercer v. Atty.-Genl. of Ont., 5 S. C. R. at p. 700, *et seq.*, for an historical statement by Gwynne, J., on this subject.

(*c*) Todd, Parl. Govt. Brit. Col., pp. 25-6.

(*d*) Can. Sess. Papers, 1883, No. 70.

whole to some extent interpreted by uniform usage and custom in the colony."

In (old) Canada the form of government was prescribed by the Act of Union (*e*). But as to all the provinces, it can be truly said that their constitutions were modelled on the pattern of the parent state, both as to their governmental machinery and as to the principle on which they were operated. In outward form, there is a close resemblance between the British constitution and the constitution of those provinces—the same single executive, the same legislative machinery (even to a second chamber), with about the same apparent connection between the two departments of government. And upon inquiry further into the motive power and the mode of its application, we may say that just as in the case of the Imperial parliament, so here in the case of the pre-Confederation provinces, one will look in vain for any statute laying down the rules which shall govern in the matter of the formation, the continuance in office, or the retirement of the Cabinet. The "conventions of the constitution," whose slow growth had gradually culminated in the full recognition of the principle of executive responsibility to parliament, was by the simple method we have shortly described—by instructions to the governors—introduced as the working principle of the provincial constitutions.

Of the causes which led to the adoption by the provinces of the Resolutions of Quebec, upon which the B. N. A. Act is founded, it is for the historian to treat. So far as those causes affected the terms of the union, as to the distribution of the field of governmental action, we shall, of course, have occasion to refer to them hereafter. Here we need only point out, that in agreeing to the establishment of a "general" government, charged with matters of com-

(*e*) 3 & 4 Vic. c. 35 (Imp.)

mon concern, the provinces resolved that such general government should be modelled on the British constitution, and that its executive authority should be administered according to the well-understood principles of the British constitution. We may say, therefore, of both the Dominion and the provincial governments: "That great body of unwritten conventions, usages, and understandings, which have in the course of time grown up in the practical working of the English constitution, form as important a part of the political system of Canada as the fundamental law itself which governs the federation" *(f)*.

(*f*) Bourinot, 'Maple Leaves,' p. 37.

CHAPTER III.

WHAT BECAME OF THE PRE-CONFEDERATION CONSTITUTIONS?

As justification for the last chapter, it was asserted that in order to establish the Dominion government, and the federal scheme of the B. N. A. Act, the slate had not been cleaned; and we shall endeavor to make good that justification.

In comparing the British and United States systems of government, the really federal character of the former—viewed as an Imperial constitution—was pointed out; but the gradual working out of the federal idea in the Imperial constitution (through continuous concessions of powers of self-government to the colonies) was contrasted with the studied action of the Fathers of the American Union, in taking this federal idea as the starting point of their departure (*a*). The reason is apparent. Thirteen self-governing communities occupied one compact territory; their inhabitants were of common origin, and had common interests; and they deliberately set to work to establish a "national" government, charged with the control of those matters which were deemed of common interest, but, just as deliberately, they insisted upon preserving their right to regulate their local concerns in their local assemblies. And so in relation to the enactment of the B. N. A. Act:—there

(*a*) See *ante*, Chap. I., p. 5, *et seq.*

was the same fact of pre-existing governments, the same desire for united action on matters of common concern, and the same deliberate refusal (based on the same desire to preserve local autonomy) to establish a legislative union, or what has been styled a "unitarian" system.

Opinions may very reasonably vary at different periods as to where the line should be drawn which is to divide matters of common or "national," from matters of "local" concern; and this variation in opinion is manifest in the assignment to our Dominion government of several subject matters, which, under the scheme of division adopted by the convention of 1787, were not assigned to their national government—for example, criminal law, and the law of "marriage and divorce" (*b*). When the idea of a Canadian Confederation began to take practical shape, the United States was in the throes of its civil war, and the notion was prevalent that that war had been caused by the weakness of the "national" government, arising from including among "state rights" the "*residuum of power*," as it has been termed. That the war was not caused by any such defect in the division of the field of governmental action was then pointed out (*c*), and has been since fully demonstrated; but the prevalence here of that notion led the fathers of confederation to desire a strong central government, and to that end the "*residuum of power*" is, under the B. N. A. Act, with the Dominion government (*d*). This fact has been much utilized in argument, to belittle the sphere of authority of the Provincial governments, and because, as it is put, these latter are governments possessing only "enumerated powers,"

(*b*) That the assignment of these (as matters of common concern requiring uniformity of treatment) to the "national" government is more consonant with modern ideas, is apparent from the numerous expressions of opinion from across the line, in favor of an amendment of the U. S. constitution in these particulars.

(*c*) See the speech of Mr. C. Dunkin—Confed. Deb., p. 491.

(*d*) See sec. 91.

the argument is pushed to this length, that the constitutions of the pre-Confederation provinces were, by the B. N. A. Act, completely wiped out, and that the powers, both legislative and executive, of the post-Federation provinces —and without regard to any necessary connection between these two departments of government—are such only as are to be found expressly set out in the B. N. A. Act. If that is the result of the enactment, never did legislation fail more egregiously in carrying out of the design of its promoters. The Quebec Resolutions convey no hint that the negotiating provinces desired more than to establish a "federal" union on terms which would be just to the provinces, and leave their autonomy, as to matters local, unimpaired. But these Resolutions, if proper to be referred to at all, can perhaps be cited to aid only in the construction of doubtful or ambiguous phraseology in the B. N. A. Act (*e*), and, therefore, the terms of the Act itself must be looked at carefully on this point. But, first, it is necessary to advert to the inaccuracy of the phrase, "*residuum of power.*" As has already been pointed out, there is not, under a federal system, any necessary division of *power*, in the proper sense of the term; the essential division which exists, being a division of the subjects proper for governmental regulation, into two classes of matters—matters of "national," and matters of "local" concern. Just what matters belong to the one class, and what to the other, is a question upon which, as we have said, opinion may vary, but whether the matters of "national" concern are enumerated, and the residuum left as of "local" concern (as by the U. S. constitution), or the matters of "local" concern enumerated, and the residuum left as of "national" concern (as is partially the case with us), is matter of indifference, so long as the enumerated class is sufficiently comprehensive to satisfy public opinion, at the time, as to the proper line of division. But what is essen-

(*e*) See *post*, Chap. X.

tial, is, that to the full limits of the matters entrusted to each government, national or local, the power of governmental action should be full and complete. It will be noticed, of course, that the division effected by the B. N. A. Act is a division of matters for legislative action, but this must involve a division along the same line for executive action. Any other arrangement would be a clear departure from that principle of the British constitution, upon which we have dwelt at some length in earlier pages—the supremacy of the maker of a law over the executor of that law—a principle which is dominant in every Anglo-Saxon community, unless, indeed, Canada is now, as is claimed, the exception.

That principle, as we have pointed out, clearly obtained in the pre-Confederation provinces as the result of the long struggle for "responsible government," and it is important therefore to ascertain whether, under the B. N. A, Act, the provincial constitutions *continue;* for if so, then the same connection between the legislature and the executive, which existed before confederation, must still continue with respect to the subjects of provincial cognizance.

Any complication which may exist in connection with this question has arisen from what has been termed "the necessities of the draftsman." One cause of the support given in the two parts of (old) Canada, to the scheme propounded by the Quebec Resolutions, was that it made provision for the severing of the tie of legislative union between them; and the carrying out, in one Act of parliament, of this design and the larger federal scheme, necessitated first the severance of that tie, and then the creation by the Act of a federal union between the *four* provinces. But, while on the one hand this necessity, and the mode of meeting it, adopted in the Act, has provided a small peg on which to hang an argument adverse to the provinces (*f*),

(*f*) As a matter of construction, it would appear that secs. 5, 6 and 7, point merely to the territorial limits to be assigned to the different provinces of the Confederation.

it has also provided several others, upon which a very strong argument may be heaped, in support of the full autonomy of the provinces in relation to the subjects allotted to them. Old Canada being thus divided into its original divisions,—with new names,—it became necessary to make provision for the establishment of new governmental machinery, legislative and executive, in Ontario and Quebec. Eliminate from the Act all clauses inserted to this end; consider Ontario and Quebec as having had governmental machinery such as existed in the Maritime Provinces; and the Act would clearly appear as an Act for the establishment of *federal* machinery only, for drawing the line of division between matters proper for the consideration of the "general" government, and those proper for the consideration of the "local" governments, and for the making over to the federal government of certain portions of the assets and revenue-producing powers of the provinces. The very use of the term *federal* in connection with the creation of a central government for territory occupied by previously existing governments, mutually independent, would seem to imply the continued existence of the individual governments, parties to the *fœdus;* and the fact that no provisions were made for Nova Scotia and New Brunswick, similar to those made for Ontario and Quebec, would appear to point to the conclusion that the governmental machinery of those provinces was to continue as before, employed, of course, upon a somewhat smaller range of matters.

The type of governmental organization in the pre-Confederation provinces was one and the same—a single executive head (assisted by an executive council), and a legislature (*g*)—and the principle upon which the whole worked in the actual government of the provinces was the principle of executive responsibility to the electorate

(*g*) The existence or non-existence of a second chamber is in no way material.

through the legislature. The B. N. A. Act makes provision, as to all the provinces, for a single executive head in each, but judging from the absence of any provision for the appointment of the Governor-General, it may be doubted if such provision would have been *expressly* made in regard to the Lieut.-Governors, had it not been intended to alter the mode of appointment, so as to make each provincial executive head, a link in the chain of federal connection (*h*). As to the "powers, authorities, and functions" of that executive head, they are particularly mentioned only as to Ontario and Quebec (*i*), and as to those two provinces only so far as they were dependent for their existence *upon statutes*, either of the Imperial parliament or the parliaments of (Old) Canada. This latter limitation has been urged as supporting the view that certain of the "powers, authorities, and functions"—those depending for their efficacy *upon the common law*—exercisable by the Governors (or Lieutenant-Governors) of the pre-Confederation provinces, are now, even as to matters within the legislative authority of Ontario and Quebec, exercisable only by the Governor-General.

We shall deal with this contention in a moment, merely remarking now that such a construction of the Act, would create diversity in the position of the different provinces, and would be a departure from the principle insisted on, as apparent throughout the British constitution—the co-extensive and complementary sphere in government, of the executive and legislative departments. The matter material to be now noted is, that these *statutory* powers had been conferred upon the holder of a particular office which was now to be divided, and therefore a statutory re-allotment, so to speak, had to be made. The language of the section to which we are now referring (sec. 65), and of what may be called its companion section (sec. 12), bears out, too, our

(*h*) Compare secs. 10 and 58, B. N. A. Act, 1867.

(*i*) B. N. A. Act, sec. 65.

criticism of the phrase, "division of power," inasmuch as both sections carefully avoid using any such term as "division." Treating the "powers, authorities, and functions" conferred by previous legislation as a sum total, they carefully provide that *all* these powers, etc., so far as they are capable of being exercised after the union, in relation to the government of the Dominion and the provinces respectively, shall be vested in the Governor-General, or in the Lieutenant-Governors, as the case may require.

To revert now to the argument founded on the limitation of sections 12 and 65 to statutory "powers," etc. We have already indicated "the necessities of the draftsman," as the reason for their insertion in the Act. But for that necessity, they would not have appeared, and we should have to look to some other part of the Act in order to ascertain the position of the executive head of the different provinces, as, indeed, we have to do with reference to Nova Scotia and New Brunswick. If there were no express provision, we should still contend that, as executive head of the province, a Lieutenant-Governor is invested with all the "powers, authorities, and functions" necessary to carry on the government of the province—that wherever provincial legislation requires, in order to its complete and efficient enforcement, the sanction of executive action, all the "powers, authorities, and functions" (prerogative and otherwise) necessary to such enforcement, reside in, and are exercisable by, the executive head of the provincial government (*j*). But we are not limited to this application of legal principles, incontestable though they be. Sec. 129 of the B. N. A. Act is clear upon this matter:—

"Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia or New Brunswick, at the Union, and all courts of civil and criminal jurisdiction, and all legal commissions, *powers and authorities*, and all officers, judicial, administra-

(*j*) See judgment of Burton, J.A., in Atty.-Gen'l (Can.) v. Atty.-Gen'l (Ont.), 19 O. A. R. 38.

tive and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made, subject nevertheless (except with respect to such as are enacted by, or exist under, Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished or altered by the Parliament of Canada, or by the legislature of the respective province, according to the authority of the parliament or of that legislature under this Act."

The language of this section is very comprehensive. It continued the whole body of pre-existing laws and legal institutions, "except as otherwise provided by this Act"; and excepting Imperial Acts and institutions existing under Imperial Acts, it divided the entire field of *law* (in its widest sense) between the Dominion and the provinces, "according to the authority of the parliament or of that legislature under this Act." This body of law would include every branch of jurisprudence—the *lex prerogativa* as well as the other branches. Combined with sec. 12, it carries the whole executive power incident to the legislative sphere of authority of the Dominion parliament, to the Dominion; and, combined with sec. 65, it has precisely the same result in relation to the government of the provinces (*k*).

With regard to the executive council in each province —in other words, *the Cabinet*—we have to point out that no provision is made for such a council in New Brunswick or Nova Scotia, beyond what may be gathered from the express enactment that the *constitution* of the executive authority in those two provinces, should *continue* as before the passing of the B. N. A. Act; while, in regard to Ontario and Quebec, the appointment of the first officers who are to constitute the executive council in those provinces is provided for. There is this difference, too, to be remarked between the section of the Act which provides for the

(*k*) Dobie v. Temporalities Board, L. R. 7 App. Cas. 136; and see notes to B. N. A. Act, secs. 12, 65 and 129, *post*.

Privy Council of the Dominion (sec. 11) and the corresponding section as to the executive councils of Ontario and Quebec (sec. 63), namely, that the latter seems to take it for granted (if we may use the expression), that there is to be an executive council in those two provinces; while the former distinctly provides that "there shall be" a Privy Council for Canada. It may here be remarked that nowhere in any statute book will be found any Act which lays down that such executive council shall continue to hold office only so long as it commands the confidence of the legislature; but the existence of that "convention of the constitution," and its *raison d'etre*, have been already dealt with at sufficient length, and no one, we fancy, would argue that any significance attaches to its absence from the B. N. A. Act. As put by Lord Russell, in his famous dispatch (*l*), of September 7th, 1839, conveying to Lord Sydenham his "instructions" as to the government of Upper Canada: "It is evidently impossible to reduce into the form of a positive enactment, a constitutional principle of this nature." But not only is the appointment of the first members of the Cabinet provided for in the case of Ontario and Quebec, but provision is also made as to their "rights, powers, duties, functions, responsibilities or authorities"—the draftsman was certainly exhaustive in his phraseology—and what has just been said as to the sections dealing with the powers, authorities and functions of the executive head, is equally applicable to sec. 135, which makes this provision as to the executive officers under him. *All* the "powers, etc., etc.," which the executive officials named, had in relation to the government of Canada, are to be vested in the officers of the provincial governments, in relation to those governments. There is no division of *power*, but of sphere of authority only.

Equally significant of the continued existence of the pre-Confederation constitutions, are the clauses of the

(*l*) Can. Ass. Jour., 1841, pp. 890-6, App. BB.

B. N. A. Act, dealing with the constitution of the legislative authority in the provinces (*m*). For Ontario and Quebec, legislatures had to be provided. The constitution of those legislatures is, of course, entirely the creation of the B. N. A. Act; but, so far as the creative clauses are concerned, there is nothing to indicate any difference in principle, between the constitution of those legislatures, and the constitution of other colonial legislatures, beyond the absence in the "constitutional" statutes relating to those other colonies, of any division of the sphere of their legislative authority. But for Nova Scotia and New Brunswick no legislatures were created, it being provided (just as had been provided with regard to the executive) that the constitution of the legislature of each of those provinces should *continue* as it existed at the Union. The House of Assembly of Nova Scotia, as it happened, had been dissolved, so that new provincial elections were necessary, and, in order to save expense, it was provided (*n*) that such new elections should take place at the same time as the first elections for the House of Commons of the Dominion. But, as to New Brunswick, its House of Assembly was still alive, and it was expressly provided that it should continue (unless sooner dissolved) for the period for which it had been elected. As to both Nova Scotia and New Brunswick, the B. N. A. Act contains no provision for the summoning of their Assemblies, for the length of time they should live, for yearly sessions, or as to the conduct of their business; as to all of which matters, minute provision is made as to the legislatures of Ontario and Quebec (*o*).

The group of clauses (*p*) of the Act, dealing with the division of the assets of the provinces, between those provinces and the Dominion, bears throughout marks of the

(*m*) Secs. 69-90. (*n*) B. N. A. Act, sec. 89

(*o*) Note, however, sec. 91, s.s. 1, *post*.

(*p*) Group VIII, secs. 102-126.

draftsman's idea that the pre-Confederation provinces *continued*;—they "shall retain all their respective public property not otherwise disposed of in this Act" (*q*); and certain duties and revenues are "reserved to the respective legislatures of the provinces (*r*)."

The division of the group of miscellaneous provisions (*s*) into "general," and "Ontario and Quebec" is in itself significant, and the absence of provisions for New Brunswick and Nova Scotia, similar to those made to meet the needs of the newly created governments of Ontario and Quebec—provisions as to the executive staff; as to the Great Seals to be used; as to the construction of temporary Acts of the parliament of old Canada, etc.—would seem to make it perfectly clear that the constitutions of the pre-Confederation provinces "by the sea," at all events, were not intended to be destroyed, and at most, it can only be said, that the constitution of old Canada was re-cast and made into two, each on the same pattern as the one had previously exhibited.

Upon consideration, it would appear that the really essential point to be determined in connection with this controversy, is the actual presence in the provincial machinery of government (in their *constitutions*, in other words,) of the same working principle as was present in the constitution of the pre-Confederation provinces. As to, Nova Scotia and New Brunswick, there can be no doubt, as the B. N. A. Act is distinct, that the constitution of the executive and legislative authority in those provinces—and these two departments comprise the whole round of government—shall *continue;* and the controversy must therefore be limited to Ontario and Quebec. And as to these two provinces, it has already been remarked that the clauses which create their legislative and executive machinery

(*q*) Sec. 117.

(*r*) Sec. 102; and see also sec. 126. (*s*) Group IX.; secs. 127-144.

differ in no essential respects from the similar clauses in other Imperial Acts creative of colonial constitutions, the presence in which of the principle of the co-extensive and complementary nature of the executive and legislative powers in government, cannot be gainsaid. No Act, Imperial or Colonial, has ever expressly so enacted; but it is the legal principle of the British constitution, and of the colonial constitutions of the Empire as well. And when we find, as a comparison of the various "constitutional Acts" for the colonies will show, that the machinery of government provided by those Acts is "all of a piece," an argument is afforded in favor of, rather than against, the existence of the same working principle in each. Compare, for instance, the clauses of the B. N. A. Act, creating the executive and legislative machinery of the Dominion government, with those creating the like machinery of the governments of Ontario and Quebec, and both sets of clauses with the similar provisions of the Acts relating to (say) the Australasian colonies, and no essential difference can be found (*t*)—nothing to indicate that in one the law-*making* power is supreme over the authority which executes that law, and that in another the two are not co-terminous. The fact is, that government is one, and indivisible. The "sanction" of a law is executive action, and no impossible attempt to create two independent powers in relation to any given subject matter, is made by any of these "Constitutional Acts."

(*t*) Compare B. N. A. Act with the Union Act (3 & 4 Vic. c. 35), and with the Constitutional Acts of New South Wales (5 & 6 Vic. c. 76; 7 & 8 Vic. c. 74; 13 & 14 Vic. c. 59, etc.); of Victoria (13 & 14 Vic. c. 59; 18 & 19 Vic. c. 55, etc.); of Newfoundland (5 & 6 Vic. c. 120; 10 & 11 Vic. c. 44), and of Queensland (24 & 25 Vic. c. 44). See Forsyth, Constitutional Law, p. 27, for an enumeration of the various "Constitutional Acts" for the colonies.

PART II.

THE RESULTS OF OUR COLONIAL STATUS.

CHAPTER IV.

WHAT IMPERIAL ACTS AFFECT US?

While we have, in the preceding chapters, endeavored to distinguish clearly between the *law* and the "*conventions*" of the constitution, we have necessarily had to deal with both. In the light of the conventions of the constitution, the parliament of the United Kingdom has been described as a legislature possessed of a dual nature, partaking of the character both of an "Imperial" parliament and of a "local" parliament for the United Kingdom. It must be again admitted, however, that although, by those usages and precepts of the constitution, the field of governmental action properly to be occupied by the Imperial parliament, is practically though not yet perhaps very definitely limited, the *law* of the constitution recognizes no limit capable of judicial enforcement.

For the whole British Empire, legislative sovereignty resides in the Imperial parliament, and when that body undertakes to legislate for the colonies generally, or for any one of them in particular, its enactments are a law unto such colony, binding on its inhabitants, and peremptorily requiring recognition by the judges in its courts (*a*); and no colonial legislature has power, directly or by a side wind, to alter, in one jot or tittle, any such Imperial enact-

(*a*) Letter by Historicus, in London *Times*, June 1, 1879; Dicey, Law of the Const.; Clark, Colonial Law, 10.

ment (*b*). That, in certain instances, colonial legislatures have been empowered by Imperial legislation (*c*) to exclude their particular colony from the operation of some particular Act—usually upon terms—is the exception which proves the rule. It must be kept clearly in mind, that we are not now discussing the "conventional" limits set to this legislative sovereignty. For the judge and the lawyer, there are no limits; for them there is, in the performance of their respective duties, no escape from the "literary theory." They have to do with *legal* rights; and, for Canada at least, legal rights are, in the ultimate analysis, founded upon Imperial enactment. By Imperial enactment, we enjoy representative government; by Imperial enactment, that enjoyment could be (as once indeed it has been) taken from us; by Imperial enactment, the legislative power conferred upon our parliaments, has been more or less limited; by Imperial enactment only, can a change be effected in those limits. No power, even its own, can tie the hands of the Imperial parliament (*d*); and the boundaries set to colonial freedom of action in one session of that parliament may be enlarged in the next, and again restricted in a third. And as in these larger matters, so in any the smallest question (*e*) involving the legal rights of the individual, if she will, she legally may, and every British judge, in every part of the British Empire, is bound to give effect to the expressed will of the Imperial parliament. So well settled is the paramount legislative authority of the Imperial parliament, that English judges have not hesitated to lay it down that:

"If the legislature of England in express terms applies its legislation to matters beyond its legislatorial capacity

(*b*) Craw v. Ramsay, Vaugh., 292. See *post*, Chap. IX.

(*c*) *E. g.* 9 & 10 Vic. c. 94, empowering the colonies to repeal Imp tariff Acts.

(*d*) Auchterarder case, Mac. & R. (H.L.) 238; Dicey, Law of th Const., 61.

(*e*) Such, for instance, as arose in Gordon v. Fuller, *infra*.

an English court must obey the English legislature, however contrary to international comity such legislation may be" (*f*).

It may perhaps seem that we have dwelt with undue emphasis on this point, but a glance at some Canadian authorities will make it apparent that, even on the bench, the legislative omnipotence of the Imperial parliament—perhaps we should rather say the legislative impotence of our colonial legislatures to alter an Imperial enactment—has not been admitted in its entirety without much discussion. Moreover, a clear recognition of this fundamental fact in the structure of the Canadian constitution, should tend to make our statesmen all the more careful that the limits within which this omnipotence is to have "conventional" scope, are clearly defined. The ultimate legal power—whose mandates must be judicially enforced—residing abroad, our right of self-government should not depend on uncertain usages, but on clearly expressed guarantees.

How are we to know when an Imperial Act extends by its own inherent force to a colony? It was never contended that English statutes were operative beyond the bounds of the United Kingdom, unless, upon a reasonable construction, there appeared the intention that they should so operate (*g*). For a long time this question of construction was unaffected by any statutory enactment, but at the present time the Imperial Act, 28 & 29 Vic. c. 63, provides the canon of construction—"An Act of parliament or any provision thereof shall . . be said to extend to any colony, when it is made applicable to such colony by the express words or necessary intendment of any Act of parliament."

(*f*) Niboyet v. Niboyet, L. R. 4 P. D. 20; and see Reg. v. Keyn, L. R. 2 Ex. D. 152, 160, 207; Reg. v. Anderson, L. R. 1 C. C. R at p. 167.

(*g*) 1 Blackstone, 107, *et seq.*; Santos v. Illidge, 8 C. B. N. S. 869, 887; Routledge v. Low, L. R. 3, E. & I. App. 113; Penley v. Beacon Assco Co., 10 Grant 428; Sussex Peerage Case, 11 Cl. & F. 146. See further on this point, *post*, Chap. IX.

A very different question this, from the question, how far English statutory law, of no expressed colonial application, has been, by Imperial grant or colonial adoption, embodied in the legal system of a colony. We are now dealing with Acts of the Imperial parliament, which, when passed, were, by "express words or necessary intendment," made applicable to our colony. The former question will be found treated in subsequent pages; but it may now be mentioned that, as a general rule, it is limited to a consideration of the English statutory law as it existed at the time of the introduction of English law into the colony. Imperial enactments of a general character, passed subsequently to such introduction, are not operative within the colony (*h*). But it follows from what has already been laid down, that there can be no time limit with regard to the class of Imperial enactments now under discussion. Of course, in the case of statutes passed prior to the acquisition of a colony, there must be the "express words or necessary intendment" requisite to make such enactment applicable to colonies to be thereafter acquired; but it is simply a question of construction—an enquiry as to the intention of the Imperial parliament.

It also necessarily follows from what we have said, that any colonial enactment inconsistent with an Imperial enactment on the same subject—which is the earlier and which the later, makes no difference—is inoperative; and so far did the English authorities carry this doctrine of "repugnancy," that colonial enactments inconsistent with the principles of the English common law, as well as those inconsistent with Imperial enactments (of the class we are now discussing), were considered inoperative; and "repugnancy," in one portion even, was considered to invalidate

(*h*) Harrison v. Spencer, 15 O. R. 692—the "Thellusson Act," 39 & 40 Geo. III. c. 9 (Imp.); Rex v. Vaughan, 4 Burr, 2500; and cases cited in last note; and see James v. McLean, 3 Allen, 161 (Nova Scotia), in which 2 Geo. II. c. 23 (Imp.), was held not to apply to a colony settled before the Act was passed.

the whole of a colonial enactment. It cannot be said that the authorities were clear to the extent mentioned, but there was a respectable opinion tending in that direction (*i*). The Act to which we have already referred (commonly known as "The Colonial Laws Validity Act, 1865,") was passed to clear away these uncertainties. It recites that doubt had been entertained respecting the validity of divers laws enacted, or purporting to be enacted, by colonial legislatures, and respecting the powers of such legislatures, and after laying down the canon of construction already quoted it enacts:

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

"III. No colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of *England*, unless the same shall be repugnant to the provisions of some such Act of parliament, order, or regulation, as aforesaid" (*j*).

Commenting on this Act, Willes, J. (in delivering the unanimous judgment of the seven judges of the Exchequer Chamber, in Phillips v. Eyre, involving a consideration of a certain "Act of Indemnity" passed by the legislature of Jamaica), says (*k*):

"It was further argued that the Act in question was contrary to the principles of English law (*l*), and, therefore, void. This

(*i*) Bowman v. Middleton, 1 Bay, 252. This limitation has even been suggested as applying to Imperial legislation—12 Rep. 76; see Dicey, Law of the Const., 59, note 1.

(*j*) 28 & 29 Vic. c. 63 (Imp.).

(*k*) L. R. 6 Q. B. at p. 20.

(*l*) Because *ex post facto* legislation. See *In re* Goodhue, 19 Grant, 366; and *post*, Chap. IX.

is a vague expression, and must mean, either contrary to some positive law of England, or to some principle of natural justice, the violation of which would induce the Court to decline giving effect even to the law of a foreign sovereign state. In the former point of view, it is clear that the repugnancy to English law which avoids a colonial Act means repugnancy to an Imperial statute, or order made by authority of such statute, applicable to the colony by express words or necessary intendment; and that, so far as such repugnancy extends, and no further, the colonial Act is void. . . . To what Act, order, or regulation, then, is the Jamaica Act of Indemnity and oblivion repugnant? (*m*) . . . It was further objected that the colonial law was contrary to natural justice, as being retrospective in its character, and taking away a right of action once vested, and that for this reason, like a foreign law against natural justice, it could have no extra-territorial force."

This objection, too, was overruled; but, as we shall have to touch upon this particular class of objection to colonial legislation at a later stage, we omit further comment here.

As we have already intimated, it has been seriously contended in the courts of this country that, under what is known as the Constitutional Act, 1791 (*n*), the Imperial parliament had—so far, at least, as concerns Imperial statutes of a date prior to its passage—given to the legislatures of Upper and Lower Canada power to annul, by direct repeal or inconsistent enactment, Imperial legislation of express colonial application.

In 1836, in the case of Gordon v. Fuller (*o*), it was decided that the first section of the Imperial Act, 5 Geo II, c. 7 (to the fourth section of which we trace our *fi. fa.*

(*m*) See further, as to what constitutes "repugnancy," Reg. v. Sherman, 17 U. C. C. P. 167. Reg. v. Slavin, *ib.* 205, seems to lay down bad law (pp. 210-11), that, because a Canadian Act is later than an Imperial Act, "the question as to any conflict between them does not arise." Reg. v. Sherman seems to foreshadow this error.

(*n*) 31 Geo. III. c. 31 (Imp.). (*o*) 5 U. C. Q. B. (O. S.) 174.

lands) (*p*), respecting affidavits to be made in England for proof of debts sued for in this colony, was not repealed by the provincial Act, (32 Geo. III. c. 1, s. 5), but from the judgment of the court, Mr. Justice—afterward Chief Justice—Macaulay dissented; and, in order to appreciate the force of the opinion delivered by Chief Justice Robinson in support of the judgment of the court, we quote first from that dissenting opinion; and, as these earlier opinions contain a large amount of clear and instructive historical statement in reference to the early constitutional history of this country, we venture to give them somewhat at length. Mr. Justice Macaulay says:

"In 1791, the 31 Geo. III. c. 31, in contemplation of a division of the provinces, provided the present constitution, and forms the source from which the powers and authorities of our provincial statutes flow. It authorized the formation of local legislatures, and enacted that his Majesty should have power, with the advice and consent of the legislative council and assembly in each province, to make laws for the peace, welfare, and good government thereof, not being repugnant to that Act. All which laws are thereby declared to be, by virtue of and under the authority of that Act, valid and binding to all intents and purposes whatever, within the provinces respectively . . . The two principle questions are—1st. Whether the provincial legislature possessed the power to subject suitors in actions for money demands, resident in England, to the *lex loci* in this respect—to the same rules of evidence prescribed for the inhabitants of the colony and all others; in other words, to remove the operation of 5 Geo. II. c. 7, from this province as a rule in such cases, or to introduce incompatible regulations on the same subject. And if so—2ndly, whether by implication (for it is not done in express terms) such effect has been accomplished. The statute 5 Geo. II. does not include all suitors and witnesses living in England, but extends only to cases of debt or account, and

(*p*) See the very interesting case, Gardiner v. Gardiner, 2 U. C. Q. B. (O. S.) 551, in which the right of a creditor to sue out a *fi. fa. lands*, is exhaustively discussed.

perhaps contemplated only those contracted in England. First, as to the power: I consider it imparted by 31 Geo. III. c. 31, which is very comprehensive, and almost unlimited in its terms: . . . . Subject to the exceptions therein expressed, I do not see that the powers of the colonial legislatures are otherwise abridged, so far at least as respects the laws in force at the time it was first organized, however liable to control by subsequent Imperial statutes, naming the province, or including it in a more general allusion to the North American possessions . . . . The King has almost unqualified power to make laws, binding upon and within the province, with the advice and consent of the legislative council and assembly; not as a mere prerogative right, or under a system of government established by commission as a royal government emanating from the grace and prerogative powers of the Crown, but by virtue of a British statute, which says that all laws so made (if not repugnant thereto) shall, by virtue of that Act, be valid and binding; and in order not to abridge the superintending control of his Majesty's government, a double negative is granted to his Majesty, who may annul and disallow Acts, although assented too in his name by the governor or lieutenant-governor representing him in his provincial parliament here. With these and other such qualifications and safeguards as the Imperial parliament deemed expedient, free scope is given to the action of the colonial legislature in all other respects; so much so, that *I cannot but regard the provincial statute, when duly passed, of equal force within the province with British statutes*, when not repugnant to 31 Geo. III. c. 31. In other words, I feel constrained to read the fifth section of our first Act (*q*) as if it had been incorporated in 31 Geo. III. c. 31, and formed one of its provisions, and conceive it competent to the provincial parliament (as a mere question of power) to exclude the operation of 5 Geo. II. c. 7, in any or in all respects by an Act duly assented to by or on behalf of his Majesty; and, if so, to produce the same effect by implication arising from the introduction of incompatible or other contradictory regulations. . . . . The second inquiry—whether this clause of it has been excluded. No provincial Act mentions it by name, and, conse-

(*q*) 32 Geo. III. c. 1 (U. C.), introducing English law into Upper Canada.

quently, if effected, it must be by implication. I have already quoted the clause of our first Act, which, in furtherance of the previous clauses adopting the law of England, prescribes the rule of evidence and the forms thereof. . . . Regarding the whole scope and spirit of our provincial Act, from the first to the last, so far as respects the general adoption of the law of England, it appears to me that 5 Geo. II. c. 7, s. 1, was not repealed, but excluded from operation here by implication, especially by the 5th section introducing inconsistent provisions."

And he proceeds to intimate his opinion that the Imperial statute, 6 Geo. IV. c. 114, which declares void all laws, by-laws, usages, or customs, repugnant to that or other British Acts, referred only to 'laws, usages, etc., founded upon the old systems of colonial government by charter or otherwise,' and not to laws made by colonial assemblies constituted under an Imperial statute.

Chief Justice Robinson, in delivering the judgment of the court, says:

"As a general principle bearing on our introduction of the English law, civil and military, I think . . . that this general adoption (*r*) of them was not intended to supersede any particular provision that had before been made in respect to a certain matter, by a competent legislative authority, applying itself particularly to the colony. It was an Act to give a general rule in cases not specially provided for. On the other hand, I think this provision of 5 Geo. II. c. 7, does not come within the 46th section of 31 Geo. III. c. 31; and that if it depended on the question whether that clause (and that clause only) disabled our legislature from repealing it, it would not now be in force. To receive such an affidavit in proof of debt at the trial does certainly militate against the rules of evidence as established in England, and, therefore, after the passing of our provincial statute, 32 Geo. III. cap. 1, it cannot be admitted, unless, 1st, it can be held that the repeal of the British statute, 5 Geo. II. c. 7, is not within the intention of the statute 32 Geo. III. cap. 1; or, 2nd, *was not within the power* of the colonial legislature."

(*r*) *i.e.* by 32 Geo. III. c. 1, (U. C.)

Then, upon a consideration of the provincial Act, 32 Geo. III. c. 1, he concludes that there is no evidence of intent to repeal; and proceeds:

"Secondly.—If the legislature intended the repeal, had they the power?

"1st. The direct effect of such repeal would be to take from persons resident in Great Britain, conveniences secured by an express British Act of parliament to them, and them only; and I cannot conceive that 31 Geo. III. c. 31, gives to this legislature such a power. . . . Nothing can be more repugnant to any Act than an attempted repeal of it, and the consequence of being illegal and void must follow, unless the effect of 31 Geo. III. c. 31, is to make our legislature independent of the provisions of the imperial statutes respecting 'repugnancy.' It may be contended that it has that effect—1st, because parliament delegated the power to make laws for the colony to our legislature, having the concurrence of the King; and that all that is done by this delegated authority (within their scope) is to be regarded as if done by the British parliament on the principle of execution of powers. 2nd. By specifying . . . certain exceptions to this power, which do not embrace such a subject as that in question, we must take it there are to be no other exceptions, and that all laws passed in this province not coming within the exceptions . . . and not repugnant to the constitutional Act which creates the power, must be within the competence of our colonial legislature. But to this, I answer—1st. That the power is to make laws to operate directly only on the peace, welfare, and good government of this province (though indirectly they may affect—which is inevitable—persons resident out of it), and that it does not reasonably extend to the repeal of an Act of the British parliament expressly passed to afford facilities to British subjects resident in England. . . . 3rd. That the British parliament did not mean to give to this colonial legislature, authority to repeal Acts of parliament prior to 31 Geo. III. expressly binding in the colony (and especially such as did not concern the colony merely), is evidenced in the strongest manner by 6 Geo. IV. c. 114, s. 49 . . . . . for it provides expressly that all laws in force or practice in any

of the British possessions of America, which are in any wise repugnant to any Act of parliament made, or to be made, in the United Kingdom, so far as such Act shall relate to and mention the said possessions, are, and shall be null and void to all intents and purposes whatever (*s*).

"It is said that 32 Geo. III. c. 1, repeals the British statute 5 Geo. II. c. 7, in this particular. If it does, it must be repugnant to it. If it be repugnant to it, then it is an Act in force, or attempted to be put in force, in this British possession, repugnant to an Act of parliament made in the United Kingdom relating to and mentioning the British possessions in America; and, therefore, as to such Act, so far as it does relate to and mention such possessions, it is null and void under the Imperial statute 6 Geo. IV. c. 114. . . . We have ascertained that in Lower Canada the Courts have uniformly held 5 Geo. II. c. 7, to be in force as respects the provisions now in question, notwithstanding that the ancient Canadian law, as the general rule of decision, is given by the British statute 14 Geo. III. c. 83 (*t*), which would make the argument stronger in favor of the supposed virtual repeal" (*u*).

Another Canadian case, illustrative of the want of full appreciation of our subjection to the supremacy of the Imperial parliament, arose in 1864,—the case of Reg. v. Schram & Anderson (*v*). These men were charged, under the Foreign Enlistment Act, 59 Geo. III. c. 69 (Imp.), with having tried to procure inhabitants of this province to enlist in the American army. Strange as it may seem, it was seriously argued, that in spite of express words making the Act applicable to all parts of the Empire, it was not in force here, because we had, at the time it was passed, a local legislature. And, although the judgment of the Court was that the Imperial Act in question was in force here, the reasons advanced, indicate no clear distinc-

(*s*) See now 28 & 29 Vic. c. 63, *supra*. (*t*) The Quebec Act, 1774.

(*u*) See also Smith v. McGowan, 11 U. C. Q. B. 399, and Gabriel v. Derbyshire, 1 U. C. C. P. 422, as showing the judicial dislike of this section of 5 Geo. II. c. 7, and its extension by an Act of Wm. IV.

(*v*) 14 U. C. C. P. 318.

tion between the legal limits (or want of legal limits) to the legislative power of the Imperial parliament, and the "conventional" limits proper to be observed in the exercise of that power. We quote from the judgment of Chief Justice Richards:

"The only ground on which we can hold that the statute, 59 Geo. III, is not in force in this country is because we have, and then had, a local parliament, and that enactments of this kind ought to be made by the authority of that parliament, and if not so made, they ought to be held not to be in force here.

"By the Constitutional Act, 1791 (31 Geo. III. c. 31), a separate legislature was established in each section of the province, to make laws for the peace, welfare, and good government thereof, such laws not being repugnant to that Act. By the Union Act (3 & 4 Vic. cap. 35), these provinces were again united, and power given to the local legislature to pass laws for the peace, welfare, and good government of the province of Canada, such laws not being repugnant to that Act, or to such parts of the Constitutional Act, 1791, as were not repealed, or to any Act of the Imperial parliament made, or to be made, and not thereby repealed, which did, or should, by express enactment, or by necessary intendment, extend to the provinces of Upper or Lower Canada, or either of them. The very words of the statute seem to imply that the power to legislate on some matters, was, and is reserved to the Imperial parliament, though this province may be affected by such legislation.

"As long as it is admitted that the Home government, by whom the supreme power of the Empire is exercised, is the proper channel through which all our relations and intercourse with foreign governments are to be carried on, the power to pass laws to bind the whole nation, so far as regards those relations and, as necessarily arising out of them, the peace of the Empire, must rest with the Imperial parliament.

"Independently of the doctrine that our local legislature can only exercise such powers as are specially conferred upon it under the statutes passed by the Imperial parliament, there are other points of view in which the question may be considered. Though possessing a domestic legislature, we form part of a

vast Empire, having other colonies exercising similar legislative powers to our own. If any one colony, by passing laws, or refusing to pass laws, produced a state of things which created difficulty with a foreign state, the whole nation might be involved in a calamitous war from the imprudence or recklessness of a very unimportant colony. Considered in this light, it appears to me that the statute which we are discussing relates to the conduct of citizens of the Empire towards foreign states and people, and is on a subject which must be disposed of and legislated upon by the Imperial parliament, as representing the supreme legislative power of the nation, and as to which it is necessary that all the subjects of the Crown should alike be bound. The very preamble of the Act states that the proceedings which the statute prohibits may be prejudicial to, and endanger the peace and welfare of the Kingdom."

And again, in Reg. v. Taylor (*w*), Chief Justice Draper, in considering the term "exclusive," in the 91st section of the B. N. A. Act, construed it as "intended as a more definite or extended renunciation, on the part of the parliament of Great Britain, of its powers over the internal affairs of the new Dominion than was contained in the Imperial statutes, 18 Geo. III. c. 12 (*x*), and 28 & 29 Vic. c. 63 (*y*)," overlooking apparently the fact that such a renunciation would be of no legal effect whatever in restraining future parliaments from legislative interference in the internal affairs of Canada, if so ill-advised as to take such an "unconventional" step. This interpretation of that term "exclusive" has, in subsequent cases, and by other judges, been very emphatically dissented from, and the general principle of the legislative supremacy of the Imperial parliament clearly laid down (*z*).

(*w*) 36 U. C. Q. B. at p. 220.

(*x*) The celebrated Renunciation Act; see *ante*, p. 36. As to the legal effect of this renunciation, see charge of Blackburn, J., in Reg. v. Eyre, reported by Finlayson.

(*y*) The Colonial Laws Validity Act, 1865.

(*z*) Smiles v. Belford, 1 O. A. R. 436; Reg. v. Coll. of Phys. 41 U. C. Q. B. 504.

In the Maritime provinces, where Imperial Acts relating to navigation were frequently invoked in the Vice-Admiralty Courts existing in those provinces, a clearer view seems to have prevailed as to the operation, within the colonies, of such Acts; and numerous cases are to be found in which, without question, effect was given to their provisions. It would appear, however, that the view was pressed in argument there, just as it was in the courts of the upper province, that a provincial Act, assented to by the Crown, was of equal validity with an Imperial Act, and if later in point of time than an Imperial Act with which it might appear to clash, it should be given effect to, in preference to such Imperial Act. In the case of "The Bermuda" (*a*), an attempt was made to attach prize money in the hands of a prize agent, under the provisions of the Nova Scotia statute, 1 Geo. III. c. 8; but it was held by Dr. Croke that this could not be permitted; that the Nova Scotia statute was in this particular "repugnant" to the Imperial "Prize Act," 49 Geo. III. c. 123, and therefore, to that extent, void. He, however, notices the contention we have referred to, in favor of the validity of the Provincial Act, and thus disposes of it:

"Considering it in another point of view, and giving it every possible validity, still the British Act must be allowed to be of equal authority, and then the provincial Act must be taken to be substantially repealed, so far as it is repugnant to the British Act, which is of a later date."

We may also refer to "The Providence," in which the provisions of the English Navigation Act (12 Car. II. c. 18) —the second section of which was directed against alien traders—was enforced in Nova Scotia against an American trader, in 1820 (*b*). That section, being of express colonial application, and not repealed by any subsequent Imperial Act, was held by Dr. Croke to be still in force in Nova Scotia, "though not often acted upon."

(*a*) Stewart, 245. (*b*) Stewart, 186.

And in like manner the English Bankruptcy Act (12 & 13 Vic. c. 106) was held to apply to Nova Scotia—so far as to discharge the bankrupt from debts there incurred—and an attachment of debts due to him, issued after the *fiat*, was set aside (*c*).

When an Imperial Act, made applicable by express words or necessary intendment to any colony, is (even after the establishment of a legislature in such colony) repealed by an Imperial Act, such repeal is operative in the colony. This was one of the points for decision in the old case of Bank of Upper Canada v. Bethune (*d*), in which it was endeavored to subject the Bank to the disabilities imposed by the English Bubble Acts. The earlier one of these Acts had been repealed by an Act of the Imperial parliament, 6 Geo. IV. c. 91, and in pronouncing the judgment of the court, that by reason of such repeal the Bubble Acts were no longer in force in Upper Canada, Robinson, C.J., brings out clearly:

1st. That the Quebec Act, 1774, and the Provincial Act, 40 Geo. III. c. 1 (upon which two Acts our enjoyment of the criminal law (*e*) of England rests), were not intended to refer to Acts expressly, or by necessary intendment, made applicable to the colonies in general, or to Canada in particular.

2nd. That such Acts continued to be, as they had always been, in force here by their own inherent vigor alone; and

3rd. That a repeal by Imperial Act would wipe them out of the list of colonial laws. It goes without saying

(*c*) Hall v. Goodall, 8 Murd. Epit. 149; Fraser v, Morrow, 2 Thomp. 232, and see also "The Friends Adventure," Stewart, 200; "The Fama," Stewart, 112; and Congdon's N. S. Dig. 1836, *et seq.*, and Steven's Dig. N. B. *sub. tit.*, "British Statutes."

(*d*) 4 U. C. Q. B. (O. S.) 165.

(*e*) The argument is equally applicable in reference to the Act 32 Geo. III. c. 1 (U. C.), introducing English *civil* law.

that his views are very clearly expressed, and we venture therefore to quote somewhat at length from his opinion:

"My opinion is, that the first Bubble Act has not been in force in this province since the repeal of that statute by the Imperial parliament in their Act of 6 Geo. IV. c. 91. While it was in force, I think it derived its obligations in the colonies, first and principally, from the very words of the statute itself. It was passed in order that its provisions might extend, not merely to London and other parts of the Kingdom, but also to Ireland and 'other his Majesty's dominions.' It was in force in the colonies by the same act of legislative authority, and its obligation rested on the same foundation in the colonies as in England. . . . . When, therefore, the legislature determined it to be expedient that the first Bubble Act, or rather those clauses of it which are now in question, should be repealed, and that the several undertakings, attempts, etc., therein prohibited should be left to be dealt with according to the common law, they did, in my opinion, absolve the application of that statute as plainly and as fully in the colonies as in other parts of the Empire where it had been in force. Of course, that must be the effect, unless some statute passed in England or in this colony since the first Bubble Act prevents it. The second Bubble Act, 14 Geo. II. c. 37, cannot, as I think, have that effect. It was never anything but a mere supplement to the first Bubble Act. *Omne accessorium sequitur suum principale.* The latter statute has nothing to stand upon if the former has been withdrawn. Then we must next consider the effect of "The Quebec Act, 1774," introducing the criminal law of England into the province of Quebec, and of our provincial statute, 40 Geo. III. c. 1, declaring that the criminal law of England, as it stood on 17th September, 1792, shall be the criminal law of this province. Neither of those enactments, in my opinion, were intended to affect, or can properly be construed to affect, the question whether the Bubble Acts are now in force in this province.

"By the Quebec Act, 1774, the British parliament clearly designed to give to Canada the criminal law of England, as to those objects and in those matters for which no special provision

had before been made by parliament. That statute had no intended reference to Acts of parliament which, from their very terms, already were as much in force in the colonies as in England, and which consequently required no introduction at that period. It left those special laws as they stood. Upon any other principle, if there had been particular penal statutes then in force applying solely and exclusively to the colonies, and forming no part of the law of England, we must have held such statutes to be virtually repealed by the Quebec Act, 1774, giving us the criminal law of England, though clearly such an effect never could have been intended. The Bubble Acts were not peculiarly the law of England—they did not come to us as introduced by The Quebec Act, 1774; they were part of the criminal law of England, and of the other colonies before, and they continued to be so upon the same ground, and no other, after the Quebec Act was passed, as before.

"Then, as to our statute 40 Geo. III. c. 1, the point is still more clear. Our colonial legislature, when they passed that Act, must be taken to have been using their discretion and choice in introducing the criminal law of England, in the whole or in part, with or without exception, as they judged best. Now, they had, at that time, no discretion to exercise in regard to these Bubble Acts, because they already formed part of our penal law, being expressly made to extend to this and other colonies by a power beyond that of the provincial legislature. If they had desired to except them they could not have done it, and, therefore, it cannot follow that because they did not except them, they adopted them; they were not legislating with any view to laws already in force under a power superior to their own. If they had excluded them, the exclusion would have been illegal; if they had introduced them, their declaration to that effect would have been idle and nugatory. I understand the provincial legislature to have left them as they found them, standing upon their own original foundation, which they had no power to strengthen or weaken; and when the parliament of the Mother Country repealed the original and principal Bubble Act, declaring that it was expedient to leave such practices and schemes to be dealt with according to the common law, they did, in my opinion, undo all that they had done by that statute, and they neither meant

to leave it in force, nor did leave it in force, in any one part of the British dominions more than in any other."

The principle we are now discussing, namely, the operative force in a colony of an Imperial Act repealing a previous Imperial Act of express application to such colony, was recognized in a comparatively recent case which came before the Judicial Committee of the Privy Council, Reg. v. Mount & Morris (*f*). These men were tried before the Supreme Criminal Court of the colony of Victoria, upon the charge of murder, alleged to have been committed on board a British ship on the high seas, and were convicted of manslaughter. The jurisdiction to try persons charged with offences committed on the sea, within the jurisdiction of the admiralty, was for the first time conferred upon colonial courts, in 1849, by the Imperial Act 12 & 13 Vic. c. 96, the second section of which provided that convicted persons should be subject to the same punishment "as by any law now in force" persons convicted of the same offence would be liable to, had the offence been committed and the trial had in England.

At the time this Act was passed, the punishment for manslaughter in England was transportation for life. Afterwards, by an Imperial Act, punishment by transportation was abolished, penal servitude being substituted therefor. There was nothing in this Act expressly extending it to the colonies; but, notwithstanding this, the Committee held that the previous Act, 12 & 13 Vic. c. 96, which had conferred on colonial criminal courts the jurisdiction to try such offences as we have mentioned, must be held to be amended (in respect to the sentence to be imposed) by the Act which abolished transportation. Their view is thus expressed:

"When the Imperial legislature substituted penal servitude for transportation, it is reasonable to suppose that the alteration

(*f*) L. R. 6 P. C. 283.

was intended to embrace sentences for offences tried in the colonies under the special jurisdiction conferred by 12 & 13 Vic., since there is no trace of any intention on the part of the legislature to change the policy of that Act, which orders these sentences to be passed according to the law of England.—

"This construction creates no conflict between Imperial and colonial authority, and in no way affects the rights and privileges of the colonial legislatures. It simply affirms that the Imperial statute, which gave the courts of the colonies *quoad* offences committed upon the seas beyond their territorial limits, a jurisdiction which their own legislatures could not confer, was altered by a subsequent Imperial Act."

This case, as will be seen, is a pretty strong one, as the alteration of the previous Act (which alteration was held to have effect in the colonies) was an alteration by implication, and not by direct amendment or repeal.

It is beyond the scope of this work to enumerate even briefly the various Imperial Acts (*g*) which to-day lay down, on various matters, the law for our guidance and submission. The most that can be done is to indicate, with no pretence of exhaustive treatment, some of the subjects

(*g*) For other cases involving an enquiry whether or not some particular Imperial Act extends to Canada, see:—

Routledge v. Low, L. R. 3 E. and I. App. 100—Copyright Act (5 & 6 Vic. c. 45).

In re Lyons, 6 U. C. Q. B. (O. S.) 627—An Act respecting Declarations in lieu of Oaths.

Hodgins v. McNeil, 9 Grant, 305—Lord Lyndhurst's Marriage Act (5 & 6 Wm. IV. c. 54). "The colonies are not mentioned in the Act, nor included by any necessary or even strong intendment."

Thompson v. Bennett, 22 U. C. C. P. 393—Orders in Lunacy (11 Geo. IV. and 1 Wm. IV. c. 60).

Re Squier, 46 U. C. Q. B. 474—Removal of Colonial Officers, (22 Geo. III. c. 75).

Georgian Bay Trans. Co. v. Fisher, 5 O. A. R. 383—Merchant Shipping Acts.

Mowat v. McPhee, 5 S. C. R. 66.

Allen v. Hanson, 18 S. C. R. 667, at p. 691—English Joint Stock Companies Acts.

on which the Imperial parliament does legislate for us. We have adverted, to some extent, to the general nature of such subjects in a previous chapter, and have indicated that they are subjects which are deemed to be of common concern to the whole Empire, but it will be advisable to defer any further remarks upon this branch until we come to treat of those sections of the B. N. A. Act which divide the field of colonial self-government allotted to Canada between the parliament of Canada on the one hand, and the Legislative Assemblies of the various provinces, on the other (*h*).

(*h*) The "Chronological Index," published with the English Law Reports, affords a convenient method of tracing the fate of Imperial Acts. See *sub. tit.* "Colonies" and the various cross-references.

CHAPTER V.

THE SOURCES OF OUR LAW.

In the last chapter, we pointed out the necessity for a careful distinction between Imperial Acts which are in force in any particular colony because "made applicable to such colony by the express words or necessary intendment" thereof (*a*) and Acts which (as coming within the term English law, or the law of England) have been, by Imperial grant or colonial adoption, made the law of the colony. A constant guard must be maintained with reference to this distinction. In the last chapter, the extent to which we are subject to the law enacted in and by the former class of Imperial Acts was discussed. This chapter will deal with those Imperial Acts, and those only, which have no expressed reference to the colonies in general, or to any colony in particular, and the enquiry is to be—To what extent are *such* Acts to be held in force in Canada?

In entering upon this enquiry, it becomes at once apparent that there is a marked variety in the position of the various provinces of which the Dominion of Canada is composed; and that the extent to which English statutory law, of a general character, is in force in the different provinces, is by no means the same. The reasons for this variety are to be sought in the differences which mark their

(*a*) 28 & 29 Vic. c. 63, s. 1 (Imp.).

early history as separate colonies of Great Britain—differences as to the mode by which they attained that distinction—differences in the methods employed by Imperial authority, in determining what system of jurisprudence should be given to such of them as had that question settled for them by Imperial authority—differences in the extent to which English law was adopted by such of them as determined the question for themselves—differences as to the point of time in reference to which the introduction took place.

"A question of this kind," said Chief Justice Robinson, in 1845, "arising in any British colony, must depend upon the manner in which the law of England has become the law of that particular colony; whether it has been merely assumed to be in force upon common law principles, as in the case of new and uninhabited lands found and planted by British subjects; or whether it has been introduced by some positive enactment of the Mother Country, or of the colony, or (as may be done in the case of a conquered country) imposed by the mere act or regulation of the King, in the exercise of his royal prerogative" (*b*).

It may be said that in Canada there are, among the provinces, representatives of each of the classes of colonies referred to by the eminent Chief Justice whose words we have quoted; and an apology, therefore, is hardly in order for making our inquiry, so to speak, *by provinces.*

The reader should, perhaps, be warned that many of the English statutes, upon which discussions have taken place and decisions been given to the effect that they must be held to be in force here, are not, at this date, in force in Canada, and for the reason that the subject with which they deal has, since they were under judicial scrutiny, received attention at the hands of our parliaments. It cannot be too carefully kept in mind that it is only in the absence of Canadian or provincial legislation

(*b*) See *post*, Chap. VI.

(as the case may be) on the subject, that any question can arise as to the effect here of an Imperial enactment, passed before the date in reference to which, English law is to be taken as a fixed "body" of law, and as such introduced into the different provinces. The cases are collected and reviewed in order to enable the reader to fully grasp, if possible, the principles on which the decision must rest, which admits or denies any Imperial statute as operative here, rather than as showing what particular Imperial enactments are to-day in force in the different provinces of Canada.

Seniores priores.—NOVA SCOTIA, as the oldest of the provinces, is entitled to the first consideration. We have already referred to the claim made by the General Assembly of that province in 1759, that Nova Scotia "did always of right belong to the Crown of England, both by priority of discovery and ancient possession" (*c*). By the Nova Scotia courts, this claim would appear to have been recognized; to this extent, at all events, that Nova Scotia has always been treated as a colony by settlement as distinguished from a colony obtained by conquest or cession. Owing to the absence of reports of the early decisions in that province, we are unable, by direct reference to decided cases, to show the way in which this question—how far English law was deemed to be introduced—was treated in the earlier years of its history. There is, however, one decision in that province which may be considered classic upon this question, and subsequent decisions have practically been but the application of the principles enunciated in that case. The decision to which we refer is that of the Supreme Court of Nova Scotia, in the case of Uniacke v. Dickson (*d*). Chief Justice Halliburton, who then presided over the court, had, at the time this decision was given (19th February, 1848), occupied a seat on the bench for over forty years. Both on account of the exhaustive treatment of the whole ques-

(*c*) *ante*, p. 26. (*d*) James, 287.

tion contained in the opinions of the Chief Justice and Mr. Justice Hill, and because the case is a fitting introduction to our whole subject, we venture to quote somewhat fully from those opinions.

The action was an action on a mortgage, in which the Attorney-General for the province intervened, claiming a charge in priority to that of the plaintiff, by reason of certain debts which were due to the Crown by the mortgagor. The claim was based upon Imperial statutes, 33 Hen. VIII. c. 39, and 13 Eliz. c. 4, the general tenor of which, is sufficiently indicated in the judgments.

HALLIBURTON, C.J.—

" . . . . . To what extent the laws of the mother country prevail in the colonies settled by her descendants, is a question which has occasioned much discussion without producing any rule approaching to precision for our guidance.

" The language of elementary writers upon this subject is couched in such general terms and qualified by such numerous exceptions, that they perplex rather than enlighten us.

" Our excellent Blackstone, for instance, says, in his commentaries (1st vol. 101), 'it hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being (which are the birth-right of every subject) are immediately there in force.' Had the learned commentator stopped here, he would indeed have laid down a rule so broad as to embrace every case and remove all difficulty; no distinction is alluded to between the common and statute law, but all the laws then in force in England are to be at once transplanted into the infant colony. His own good sense, however, at once pointed out to him the absurdity of such a position, and he immediately adds: 'But this must be understood with very many and very great restrictions; they carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony'; and among his exceptions, he particularly mentions the laws of police and revenue.

" Among the colonists themselves there has generally existed a strong disposition to draw a distinction between the common

and the statute law. As a code, they have been disposed to adopt the whole of the former, with the exception of such parts only as were obviously inconsistent with their new situations, whilst, far from being inclined to adopt the whole body of the statute law, they thought that such parts of them only were in force among them as were obviously applicable to, and necessary for, them.

"As it respects the common law, any exclusion formed the exception; whereas, in the statute law, the reception formed the exception.

"Now, although this view of the subject leads us to nothing very precise, yet, if we adopt it, and I think it wise and safe to do so, we must hold it to be quite clear that an English statute is applicable and necessary for us before we decide that it is in force here.

"The language of C.J. Chipman, in the case of the King v. McLaughlin (*e*), might induce us to suppose that he did not recognize this distinction, for he says: 'As to the distinction attempted to be drawn by the counsel for the claimants, between the common law and the statute law extending to the colonies, other statutes than those mentioned by the Solicitor-General are daily acted upon'; but when I turn to the expression of this able judge at the commencement of his opinion, I think he sanctions the distinction. He there says: 'Each colony, at its settlement, takes with it the common law and all the statute law applicable to its colonial condition.' Indeed, the distinction exists in the very nature of things, and is derived from the origin of the two codes. The common law has its foundation in those general and immutable principles of justice which regulate the intercourse of men with men, wherever they may reside. The statute law emanates from the wisdom of the legislature of the day, varies with varying circumstances, and consists of enactments which may be beneficial at one time and

(*e*) There does not seem to be any printed report of this case, beyond a note of it in Stevens' Dig. (N. B.). It involved the same Imperial Act as was in question in Unlacke v. Dickson; but, in New Brunswick, the Act was held to be in force. As will be noticed hereafter, the courts of that province have been more liberal in their recognition of the binding force in the province of British Acts; see *post*.

injurious at another—which might advance the interests of one community, and prove ruinous to those who were differently situated.

"My venerable predecessor, C.J. Blowers, who presided so ably in the Supreme Court for many years, inclined to the opinion, that those statutes only which were in amelioration of the common law, and increased the liberty of the subject, were in force here; and though (as we have no reports of the decisions) my memory does not enable me to mention any particular case which he decided upon that principle, I well recollect that he was invariably influenced by it in all cases to which it was applicable.

"It has been contended that the 32rd of Henry VIII. is in amendment of the common law, and I observe that Mr. Justice Botsford, in the case I have alluded to (Rex. v. McLaughlin), gave a reluctant assent to the adoption of it in New Brunswick upon that ground. The 74th section, to which he particularly alluded, may, perhaps, be deemed to have that tendency, although conflicting decisions have been given in cases arising upon it, in Westminster Hall; but surely, taking the statute as a whole, it never can be considered in that light. But without excluding either statute upon that ground alone, let us inquire upon what ground they are now, for the first time, to be adopted, when we have had a local legislature for nearly a century, fully empowered to make such laws as the interests of the colony has required. . . . . .

"In continuing his observations upon the extension of the laws of England to the colonies of the Empire, Blackstone says, in the same page from which I have already quoted, 'What shall be admitted and what rejected, at what times and under what restrictions, must, in case of dispute, be decided, in the first instance, by their own provincial judicature, subject to the revision and control of the King in Council.' It is not contended that either of those statutes has ever received this sanction in Nova Scotia. The attempt to enforce them here is now, for the first time, made; and it appears to me to be incumbent upon those who preside in the respective courts of judicature in this province gravely to consider whether the adoption of their

provisions, if it be judicious to adopt them, is not now rather the province of the legislature than the courts.

"In the early settlement of a colony, when the local legislature has just been called into existence, and has its attention engrossed by the immediate wants of the infant community in their new situation, the courts of judicature would naturally look for guidance, in deciding upon the claims of litigants, to the general laws of the mother country, and would exercise greater latitude in the adoption of them than they would be entitled to do as their local legislature, in the gradual development of its powers, assumed its proper position. *Every year should render the courts more cautious in the adoption of laws that had never been previously introduced into the colony*, for prudent judges would remember that it is the province of the courts to declare what is the law, and of the legislature to decide what it shall be.

"Impressed with this view of the distinct functions of the legislature and the courts at this period of our colonial existence, it does appear to me that if additional fiscal regulations are necessary to assure the due collection and payment of our provincial revenue, it would be more proper to apply to the legislature to adopt such as they may deem prudent, than to require from the courts the adoption of English statutes which were passed centuries ago, under sovereigns who were sufficiently careful of the preservation of their power, and by parliaments who, to say the least, paid as much attention to the prerogatives of the Crown as they did to the privileges of the people—statutes, the rigours of which have been diminished in the mother country during the reign of our present gracious Queen, (5 Victoria, c. 11).

"Should this course be pursued, our legislature can introduce similar ameliorations of these statutes, if they think it right to adopt them. The courts have no such power; but, if they adopt them at all, must adopt them in all their rigour.

"The 32rd of Henry VIII., if enforced here as it now stands in the English statute book, would, to a great extent, be destructive of that security to purchasers of real estate which our registry Acts were passed to ensure.

"The 18th of Elizabeth would partially have that effect also, but not so mischievously, because the officers liable to its provisions would be generally known. But bonds to the Crown, in security for the payment of duties, are given all over the province by persons engaged in the trade and others, and no one could be sure that he was safe in purchasing real estate if that statute should be now adopted.

"There is another objection to the adoption of those statutes which I think has some weight. The Supreme Court has generally considered that when the local legislature has legislated upon any particular subject, relative to which English statutes had previously existed, the colonial courts are to be guided by the provincial and not the English statutes in deciding questions upon such subjects. Thus, upon a claim of a mother to succeed to the personal estate of her deceased child, to the exclusion of her other children, the Supreme Court of this province decided that she was entitled to do so, because our legislature had re-enacted the provisions of the statutes of Charles II. upon that subject, but had not at that time (although they have since) re-enacted those of 1 James II., which latter statute had passed before we had a local legislature.

"Now, our legislature have had the subject of the securities necessary to be given for the safe collection of the revenue, under their consideration, and have passed laws upon that subject, which direct that the officers appointed to collect it shall give bonds, in which they shall be joined by sureties, for the faithful discharge of their duties; and that those who import goods liable to pay duties to the Crown, under the Acts of this province, shall not only give bonds for the payment of those duties as they become due, but shall also give warrants of attorney to confess judgment upon those bonds; a measure that would have been unnecessary if the statute of Henry VIII. was in force here, for that statute would have made the bonds themselves debts of record. If those sureties are not sufficient, the legislature, and not the courts, should be applied to, to remedy the evil.

"For those reasons I am of the opinion that those statutes, on which the Attorney-General has founded the right of the Crown

to interpose in this case are not in force here, and consequently that right cannot be sustained by them. . . . . "

HILL, J.—

". . . . . Then, upon the best consideration I have been able to give to the question, I am of opinion that neither the statute 32 Hen. VIII. c. 39, nor that of 13 Elizabeth, c. 4, extend to, or are operative in, this province. There is confessedly no precise rule, nor can we expect to find any direct decision, as to what Imperial statutes extend to the colonies discovered, settled, and peopled by British subjects. *The question seems to be, and indeed must of necessity be, left open to be decided in each particular colony and case by the courts established in those colonies.* A law that would be very fit, advantageous, and applicable to one colony, might be very inapplicable to, and unfit for another — one very requisite in one colony, might not be at all required in another; nay, might be very unfit for it, and injudicious to be adopted.

"The general rule on this subject appears to be, that wherever English subjects discover and possess themselves of an' uninhabited country, they carry with them such of the English laws then in force as are applicable and necessary to their situation and the condition of the infant colony; as, for instance, laws for the protection of their persons and property. Wherever an Englishman goes, he carries with him as much of the English law and liberty as the nature of his situation will allow. Lord Mansfield, in the case of Lindo v. Lord Rodney, reported in note (*l*) to the case of Le Caux v. Eden, Doug. 594, says: 'The colonies take all the common and statute law of England applicable to their situation and condition.' Blackstone, in his Commentaries, Vol. I. 106 thus lays it down: 'Besides those adjacent islands (the islands of Jersey, Guernsey, and others) our more distant plantations in America and elsewhere are also, in some respects, subject to the English law. Plantations or colonies in distant countries are either such where the lands are claimed by right of occupancy only, finding them desert and uncultivated, and peopling them for the mother country; or, when already cultivated, they have either been gained by conquest, or ceded to us by treaties; and both these rights are founded upon the law of nature, or at least, upon that of nations. But there is a difference between these two species

of colonies with respect to the laws by which they are bound; for it hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birth-right of every subject, are immediately there in force. But this' (that is the doctrine laid down in Salk. 411 and 666, whom Blackstone quotes) 'must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great commercial people, the laws of police and revenue (such especially as are inforced by penalties) the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and, therefore, are not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided, in the first instance, by their own provincial judicature, subject to the revision and control of the King in Council.'

"Blackstone, therefore, dissents from the unrestricted position in Blankard v. Galdy, Salk. 411.

"Chitty, on Prerogatives of the Crown, p. 30, appears to adopt the doctrine as modified and restricted by Blackstone. He says, 'If an uninhabited country be discovered and peopled by English subjects, they are supposed to possess themselves of it for their sovereign, and such of the English laws then in force as are applicable and necessary to their situation and the condition of an infant colony—as, for instance, laws for the protection of their persons and property—are immediately in force. Wherever an Englishman goes, he carries with him as much of English law and liberty as the nature of his situation will allow.'

"Chitty refers to an anonymous case, in 2 P. Will. 75, and to the Queen v. Mayor and Aldermen of Norwich, 2 Ld. Raymond, 1245, in which last case Lord Holt refers to Blankard v. Galdy.

"Clarke's Colonial Law, p. 7, is merely a repetition of what Blackstone has already said on this subject, and from whom I have quoted.

"The whole tenor and spirit of what all the writers on this subject have said, and of all the cases relating to it, in my mind, leave the question under consideration widely open, and that *whether a particular statute does or does not extend to a colony is to be decided in each particular case by the colonial judicature*, subject to an appeal home.

"When this colony was first settled and possessed by English subjects, were those two statutes applicable and necessary to the condition and state of the first occupiers and possessors? Did the state of the colony require them to be in force? I do not conceive the question to be whether the whole or some small part of these Acts might not, as it were, be pressed into the service, but whether they are necessary to our wants and requirements? Looking then at the matter in this point of view, I cannot say that these statutes were, or are, necessary to the state and condition of Nova Scotia—to its wants and requirements. In that great country where these statutes were passed, the rights of the Crown were considered sufficiently protected under the common law until the time of their enactment; and in an infant colony like this, at its first settlement, and even now, the rights of the Crown will find ample and adequate protection under that same law, without requiring the aid of these stringent statutes. There is no danger, I think, of its being prejudiced in the collections of its revenue, or otherwise.

"Up to this period I have never heard of any complaint or difficulties upon the subject. In England, where the Crown revenues were so great, and derivable from so many resources, and where its dues necessarily pass through so many hands, it might be very proper to clothe the Crown with greater authority and security to collect its revenues. But how could that be necessary here, on the first settlement of the country, when the Crown may be literally said to have had no revenue from any source, nor any debts due to it? But how has the colonial legislature silently spoken upon this subject? If it had been thought that these statutes were wholesome, necessary, and applicable to us, I cannot but think that our legislature would have so said by re-enacting them: The legislature, in its very first session in 1758, did re-enact many provisions of English statutes which were thought applicable to our situation, and

from time to time such re-enactments have found their way into our statute books, but we find nothing of these statutes being re-enacted. Does not then this fact show in strong colors what the opinion of our legislature was and has been on the matter? for, as I have remarked, if occasion had called for it, there undoubtedly would have been a re-enactment. As far, therefore, as the opinion of the legislature may be gathered, these statutes do not extend to us; and I must add, that, on a reference to our statute book, it will be found that very particular attention has been paid to the securing the debts of the Crown under our various revenue Acts, and particularly under those of a later date. The mode of securing and the manner of collecting are precisely pointed out, so that it is manifest the subject of the Crown debts has been under the consideration of our own legislature. I allude to this, not as showing that our legislature would abrogate the statutes of Henry and Elizabeth, but as an argument that they did not extend to us.

"Thus far, then, as to the legislature. What, then, has been the opinion and practice among the profession? Cases must have arisen in which these statutes, if extending here, might, and probably would, be called into operation; and yet this is the first occasion on which the attention of any court in the province has been called to them. The contrary has not been asserted; and, no doubt, the fact is, that the writ of extent never issued in this country. The ordinary process of our courts has invariably been the mode of collecting the Crown debts. Why, then, has this been so? I apprehend merely because no inconvenience has ever been found to flow from following the ordinary and prevailing practice—no detriment to the rights or interests of the Crown. This non-user, if I may so speak, of either of these statutes, this want of any reference to them, convinces me that the profession, at all events, never considered them as having any efficacy with us.

"Now, the interest in this case is entirely local, it alone concerns the province and the support of its government; no portion of this money goes into the private coffers of the sovereign, or into the Imperial treasury; and when circumstances shall demand it, doubtless we shall pass our statutes of Henry and Elizabeth, as was done in England.

But let us suppose that our legislature in 1758 had re-enacted these two statutes, or that portion of them which relates to the matter in hand; could it be said that they were necessary, or rather, could it be denied that their enactment would have been absurd, inasmuch as there was nothing for them to operate on.

"The question, therefore, after all, is a narrow one, and may be said to be more addressed to our judgment, *as prudent and right-judging men*, than as lawyers and judges. My opinion, therefore, is based upon this consideration, that neither of these statutes was applicable and necessary to our state and condition when the province was first settled, nor at any time since, and that the rights of the Crown are amply protected and secured by the common law."

Acts in curtailment of prerogative seem to have been favorably looked on by Nova Scotia judges. Magna Charta and the second and third charters of Henry III. were held (*f*) to be operative within the province, to prevent the Crown from granting a general right of fishery; for, as was said, a grant to support that must be as old as the reign of Henry II., and, therefore, beyond legal memory; for, by Magna Charta and the charters of Henry III., the king is expressly precluded from making fresh grants. Again, it was held (*g*) that where land had been granted, with a condition that the grant should be void if the land were not settled upon within a certain time, no new grant could be made without inquest taken; the provisions of the statutes 8 Henry VIII. c. 16, and 18 Henry VIII. c. 6, being held operative within the province, to prevent such new grant from taking effect. The view acted upon by the court is thus expressed:

"The very grievances intended to be remedied and redressed by this statute, are those under which the subjects of this province might well say they labored, if it were held that land,

(*f*) Meisner v. Fanning, 2 Thomp. 97.

(*g*) Wheeldek v. McKeown, 1 Thomp. 41 (2nd ed.); and see also Miller v. Lanty, *ib.*, 101.

granted with a condition that the grant should be void if the land were not settled on within a certain time, could be subsequently granted without inquest of office."

The same view was thus expressed in a later case (*h*) involving consideration of the same statute:

"The court has uniformly decided that when there is *plena possessio* held against the Crown—particularly under color of title—the Crown must re-invest itself with the possession before it can grant; and, if it grant while it is out of possession, that grant is void under 8 Henry VIII. c. 16, and 18 Henry VIII. c. 6."

In a still later case (*i*), involving consideration of 21 Jac. I. c. 14—an Act *in pari materia* with the statutes of Henry, above referred to—Young, C.J., speaking of Uniacke v. Dickson and the statute there in question, says:

"The statute of James is of a different character. The object of the former was to extend, that of the latter is to limit and restrain, the prerogative of the Crown, and that for a highly beneficial purpose, and for the protection and benefit of the subject. What class of persons is better entitled to the favor of the legislature and the courts than the men who transform a rude country into smiling habitations, and fit it for the use and enjoyment of man? I look upon this statute of James as peculiarly suited to our condition and circumstances, and to have the same title to be considered part of our law, and on the same principle on which we have always recognized the Statute of Uses and the statute *de Donis* until the present enactment abolishing estates-tail."

The view expressed by Halliburton, C.J., in Uniacke v. Dickson, that after a legislature has been duly constituted in a colony, and has, so to speak, settled down to its work, courts of law should be very cautious in giving effect to Imperial Acts which had never been previously acted upon

(*h*) Scott v. Henderson, 2 Thomp. 115.

(*i*) Smyth v. McDonald, 1 Old. 274.

in the colony (*j*), has evidently had a most powerful effect in subsequent cases. For instance, the court refused to visit upon the sheriff of Halifax penalties to which he would have been liable under English statutes, because the Nova Scotia legislature "have wisely legislated for the whole matter. . . . . The imperative words of the English statute throw the responsibility upon the sheriff in England, but these words are not to be found in our statute, and therefore neither law nor justice throw it upon him here" (*k*).

And, in like manner, the Imperial statutes 28 Edw. III. c. 13, and 8 Hen. VI. c. 29, giving aliens a right to a jury *de medietate linguæ*, and the other statutes with that object, were held (*l*) not to be in force in Nova Scotia, because:

"In the numerous Jury Acts, extending from 1759 . . . . down to the Revised Statutes (2nd ser.), not the slightest allusion nor provision for this privilege of aliens . . . is to be found. This long course of legislation, coupled with the fact that it has never before been claimed in our courts, though the idea, and the usage in the mother country, were familiar to every lawyer, is strong evidence of the opinions held by our judges and legislators."

In a late case (*m*), the Supreme Court of Nova Scotia had to consider the question whether or not the imperial statute 13 Geo. II. c. 18, requiring notice to a convicting justice, of a motion for a writ of *certiorari*, and limiting the time for moving for such writ, to six months from conviction, was in force in the province. Reference was made by

(*j*) See the passage, *ante* p. 81.

(*k*) Jackson v. Campbell, 1 Thomp. 18 (2nd ed.).

(*l*) Reg. v. Burdell, 1 Old. 126.

(*m*) Reg. v. Porter, 20 N. S. R. Reference is made to the fact that in Upper Canada it had been always treated as in force there. It appears to have been acted on in Nova Scotia. See Reg. v. McFadden, 6 R. & G. 426, and McDonald v. Ronan, 7 R. & G. 25. As to New Brunswick, see *post*, p. 94.

Ritchie, J., in delivering the judgment of the court, to Uniacke v. Dickson. After quoting the caution of Halliburton, C.J., above referred to, the opinion proceeds:

"If this caution was necessary forty years ago, there is much more necessity for caution now, in view of the fact that, since then, very many Acts have been passed, regulating the practice and procedure of this court, and the removal of causes from inferior courts. . . . Now, our legislature has passed several statutes on the subject. . . . I cannot see that 18 Geo. II. c. 18, is obviously applicable and necessary to our condition in this province; and as our legislature has undertaken to legislate in the matter of *certiorari*, and has enacted many of the provisions of the English statutes on that subject, omitting those contained in the Act in question, I have been unable to come to the conclusion that that Act is at present in force here."

A number of Imperial Acts, passed prior to the settlement of Nova Scotia, have been acted upon without question, as having been introduced into the colony upon its settlement. The Statute of Uses was, without question, treated as being in force within the province (*n*), while its companion—the Statute of Enrolment—would appear to have been thought inapplicable, by reason of the lack of facilities for enrolment (*o*). The Imperial Acts, 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, allowing partition between joint tenants and tenants in common, were held to have been introduced into Nova Scotia as part of the English law; and the Nova Scotia legislature, in passing R. S. N. S. c. 139, s. 1, was held to have intended to make the remedy thereby provided, concurrent with the remedy under those statutes of Henry VIII. (*p*). In the case of "The Dart" (*q*), the provisions of Magna Charta; and of the Statute of Staples, 27 Edward III. c. 17, which provided that, "In case of war, merchant strangers

(*n*) Shey v. Chisholm, James, 52.

(*o*) Berry v. Berry, 4 R. & G. 66; see the contrary holding in New Brunswick, *Doe d.* Hanington v. McFadden, Berton, 158, *post*, p. 92.

(*p*) Doane v. McKenny, James, 328. (*q*) Stewart.

shall have free liberty to depart the realm with their goods freely," were enforced in favor of an American vessel seized before the commencement of the American war of 1812. The Act 13 Eliz. c. 5, respecting fraudulent conveyances, seems to have been acted upon without question (*r*), as also the Act 32 Henry VIII. c. 9, against the buying of pretended titles (*s*).

Upon a review of these Nova Scotia decisions, it would certainly appear that the admission of Imperial statutes, as operative within the province, has been the exception; those which have been held to be in force, being, in the main, statutes in amelioration of the rigors of the common law, Acts in curtailment of prerogative or in enlargement of the liberty of the subject. To a greater extent than has been the case in either New Brunswick or Ontario, the judges of Nova Scotia have deemed it the office of legislation, rather than of judicial decision, to bring into operation within the province, the provisions of Imperial statutes not originally capable of being made operative, but which might be thought suitable to the changed circumstances of the colony. And in the same spirit, it was laid down (*t*), that where an English Act is held to be in force, the courts "will not give it a further extension than it received in the land of its origin. The operation of an English statute may be confined, I take it, within narrower bounds by the circumstances and situation of the colony to which it has been brought; but it can never, as it appears to me, become a

(*r*) Tarratt v. Sawyer, 1 Thomp. 46 (2nd ed.); Moore v. Moore, 1 R. & G. 525; and Graham v. Boll, 5 R. & G. 90.

(*s*) Wheelock v. Morrison, 1 N. S. D. 387; Scott v. Henderson, 2 Thomp. 115. Other Imperial Acts which have been treated as in force in Nova Scotia, are: 18 Edw. I. c. 18 (elegit), Caldwell v. Kinsman, James, 398; 2 Hen. IV. c. 7 (judgment of nonsuit), Grant v. Protection Ins. Co., 1 Thomp. 12 (2nd ed.); 7 Hen. VIII. c. 4 (damages in replevin); Freeman v. Harrington, 1 Old. 358; and see Congdon's N. S. Dig., col. 1336, *et seq.*

(*t*) Freeman v. Morton, 2 Thomp. 352, *per* Bliss, J.

statute of greater effect or more enlarged construction than was given to it in the intention of those by whom it was passed. This is the office of legislation alone."

NEW BRUNSWICK.—In this province, we have the same difficulty to contend with as was noted in the case of Nova Scotia, namely, that there are no reports of the earlier decisions in the province during the time when this question would be most frequently under consideration. The earliest reported case (*u*) in which we are furnished with the opinions of the judges, is *Doe dem* Hanington v. McFadden (*v*), in which the Supreme Court of that province had to consider whether or not the Statute of Uses and its companion —the Statute of Enrolment—were in force in the province, and that case has had a very large controlling influence in New Brunswick. Chipman, C.J., quotes with approval the language of Sir W. Grant in Attorney-General v. Stewart (*w*), and takes as his guide, the principle enunciated in that case—"Whether it be a law of local policy, adapted solely to the country in which it was made, or a general regulation of property, equally applicable to any country, in which it is by the rules of English law that property is governed." As to the Statute of Uses, no doubt whatever was expressed; the fact that that statute had been generally, if not universally, considered to be in force in the old American colonies, was treated as indicative of the general understanding that the statute was carried by emigrating colonists as part of the law of England relating to real property. As to the Statute of Enrolment, more hesitation seems to have been expressed; but all the judges concurred in treating the two statutes as practically one; and, although the Statute of Enrolment might be somewhat difficult of application in New Brunswick, it seems to have been considered that the machinery of the provincial courts could be utilized in this respect.

(*u*) See note, *ante*, p. 79, as to Rex. v. McLaughlin.

(*v*) Berton, 153. (*w*) 2 Mer. at p. 160.

It was pointed out that the extension to the province, of statutes which are in terms confined to the courts of the mother country, is not, by any means, without precedent, and several of such statutes, regulative of the practice in "Her Majesty's Courts at Westminster," which had always been treated as operative within the province in relation to the superior courts there, were cited (*x*).

No such clear thread of principle can be discerned in the decisions of the New Brunswick courts as has been noticed in the case of Nova Scotia, and, for that reason, it is somewhat difficult to classify the decisions.

In an early case (*y*), it was held that the Imperial Act, 32 Henry VIII. c. 39, which authorized the Exchequer Court in England to give relief to Crown debtors, was operative to enable the Supreme Court of New Brunswick to relieve from an estreated recognizance.

Following Attorney-General v. Stewart, it was held (*z*) that the Statute of Mortmain, 9 Geo. II. c. 36, is not in force in New Brunswick.

In Kavanagh v. Phelon (*a*), involving a consideration of the fees proper to be paid to a sheriff, it was held that 29 Eliz. c. 4, was not operative in New Brunswick to regulate the sheriff's fees, in cases not provided for by the provincial ordinance upon the subject. Referring to *Doe dem* Hanington v. McFadden (*b*), Chipman, C.J., says:

"For the same reason it seems to me that the statute o Eliz. is entirely inapplicable to this or any other colony, and, therefore, is not in force here. It is difficult to conceive of any

(*x*) 4 Anne, c. 16 (assignment of bail-bonds); 14 Geo. II. c. 17 (judgment of nonsuit); and see Kelly v. Jones, 2 Allen, 473 (43 Eliz. c. 6—certificate as to costs), and Gilbert v. Sayre, *ib.* 512 (13 Car. II. c. 2—double costs on affirmance in error). See Hesketh v. Ward, 17 U. C. C. P. 607, referred to *post*.

(*y*) Reg. v. Appleby, Berton, 397.

(*z*) *Doe d.* Hasen v. Rector of St. James, 2 P. & B. 479; see the cases in Ontario, *post*.

(*a*) 1 Kerr, 472.

(*b*) *Ante* p. 92.

subject that must be dealt with upon considerations more entirely local, than the proper remuneration to be allowed to public officers."

and he refers to the declaration in the provincial ordinance that "there is no law or ordinance now in force regulating sheriffs' fees," etc., and the regulation of the matter by that ordinance, as indicative of the view of the legislature (c).

Although, as we have said, it is very difficult to classify the New Brunswick authorities upon this question, this much does appear: that in every case the judges of the courts there have endeavored to exercise their best judgment as to the *applicability* of the Imperial statute to the circumstances of the colony. If any distinction in principle can be drawn between the decisions in New Brunswick and those in Nova Scotia, it would appear to be along the line indicated in the judgment of Halliburton, C.J., in Uniacke *v.* Dickson—that is to say, Imperial statutes have been denied operative force in Nova Scotia unless clearly applicable, while, in New Brunswick, the tendency, at least of the earlier authorities, seems to have been not to reject them unless clearly inapplicable. At the same time, it must be confessed that this distinction cannot be clearly pointed out in every case.

ONTARIO falls within the class of colonies into whose legal system, English law has been introduced by the will of the colony itself, as expressed in legislative enactment.

In the year 1791, the parliament of Great Britain passed an Act, 31 Geo. III. c. 31, commonly known in

(c) For other New Brunswick cases, see *Ex parte* Ritchie, 2 Kerr, 75, and *Ex parte* Bustin, 2 Allen, 211, in which the English statutes as to *certiorari* proceedings were held not in force; Wilson v. Jones, 1 Allen, 658, in which 1 Rich. II. c. 12, giving a creditor an action of debt against a sheriff on an escape, was (following an early unreported decision) held not in force, although it was acted upon in Nova Scotia and the older American colonies; and see James v. McLean, 3 Allen, 164, and *Doe d.* Allen v. Murray, 2 Kerr, 359.

Canada as the Constitutional Act, 1791, by which provision was made for the division of the province of Quebec into two provinces, Upper and Lower Canada, and for the establishment therein of separate governments. During the progress of the war of American independence, there had taken place, from the disaffected colonies into what afterwards became Upper Canada, a large influx of loyal subjects, "born and educated in countries where the English laws were established, and . . . . unaccustomed to the laws of Canada." And as, in 1774, the parliament of Great Britain, by giving to the inhabitants of Canada, then almost exclusively French, the law in accordance with which they had been accustomed to regulate their daily lives, secured their cordial adherence to British connection, despite the enticing words of Washington and his French allies (*d*), so, in 1791, they established the new immigration in content in the upper province, by giving them a distinct legislature, with the power to adopt such system of laws as they might deem best calculated to secure and advance their own material and religious welfare. Avoiding all appearance of dictation to either province, the Constitutional Act, 1791, simply provided that there should be within each of the provinces respectively, a Legislative Council and an Assembly, and that in each of the provinces His Majesty should have power, by and with the advice and consent of the Legislative Council and Assembly of such province, to make laws for the peace, welfare, and good government thereof, such laws not being repugnant to the Act. All laws, ordinances, and statutes in force within the provinces, or either of them, at the date of the Act, were to remain and continue as if the Act had not been made, except in so far as not expressly varied by the Act—the Act is limited to the making of constitutional changes—or *except in so far as the same might be there-*

(d) See Confed. Deb. p. 606; Ryerson, "The U. E. Loyalists in America."

after repealed or varied by the Legislative Council and Assemblies of the respective provinces. The inhabitants of Lower Canada, being content with the law under which they had lived since 1774, made no change; but, in the very first parliament of Upper Canada, by the first Act of its first session, "that was done which no doubt was anticipated and intended as a consequence of erecting Upper Canada into a separate province. Reciting that the provision made by the Quebec Act, 1774 (before alluded to), had been manifestly intended for the accommodation of His Majesty's Canadian subjects, and that the territory comprising Upper Canada had become inhabited principally by British subjects, unaccustomed to the laws of Canada, it repealed the provision in the Quebec Act, 1774, so far as that Act had the effect of introducing the French law into Upper Canada, and enacted, that 'from and after the passing of this Act, in all matters of controversy *relative to property and civil rights*, resort should be had to the laws of England, as the rule for the decision of the same'" (*e*).

The criminal law of England had been in force in the old province, and no legislation was deemed necessary by the legislature of Upper Canada, beyond naming a day, in reference to which the English criminal law was to be considered fixed (so far as Upper Canada was concerned), unless altered by the colonial legislature. This date was fixed by 40 Geo. III. c. 1 (U. C.), which enacted: "The criminal law of England, as it stood on the 17th day of September, 1792, shall be, and the same is hereby declared to be, the criminal law of this province," subject to any variations therein, effected by ordinances of the old province of Quebec passed after the Quebec Act of 1774. The difference in the phraseology in the two Acts of 32 and 40 Geo. III. respectively, must be carefully noted, for, as will

(*e*) *Per* Robinson, C.J., in *Doe d.* Anderson v. Todd, 2 U. C. Q. B. 82; note the same expression, "property and civil rights," in the B. N. A. Act, s. 92, ss. 13, and s. 94; and see Citizens v. Parsons, L. R. 7 App. Cas. 96.

be seen hereafter, a marked difference in effect has been attributed to these two enactments. In the various revisions of the statute law, which have since taken place, these two Acts have been simply "brought up to date." They now stand as c. 93 of the Revised Statutes of Ontario (1887), and c. 144, s. 1, of the Revised Statutes of Canada (1886), respectively.

In the province of Ontario, therefore, the whole question turns upon the effect which should be given to these, our own enactments, and so far as concerns the law *relative to property and civil rights*, it will be found that, owing to the construction placed upon 32 Geo. III. c. 1, by the courts in Upper Canada, the same method of enquiry has been followed in that province (now Ontario) as in the older provinces of Nova Scotia and New Brunswick.

Although the question is, with every session of our parliaments, becoming less and less of vital importance, still cases do even yet, and not infrequently arise, even in these provinces, in which the rights of suitors depend upon English statutes of considerable antiquity, making provisions as to various matters upon which our parliaments have omitted to exercise their legislative power.

Throughout the law reports of Upper Canada (Ontario), numerous cases will be found in which laws passed by the parliament of England, and in force there in 1792, were without question acted upon by our courts as being the law in Upper Canada. In the very first volume of reported cases, by Taylor, several of such instances appear (*f*), and so on through the reports to the present time. For instance, no question seems to have ever been raised as to the English Statute of Frauds, the Acts of Elizabeth's time as to fraudulent and voluntary conveyances, and a casual glance at our Digests will reveal many others, as to which no doubt has ever found a reporter. As being in affirmance of the common law, or in amendment of some defect

(*f*) Taylor, 546.

in that law, working general detriment, their position, as practically part and parcel of general English law, was too fully recognized to be questioned. But—not to mention many English Acts, whose non-applicability (if that be sound ground for rejection) is debateable—many old enactments, some regulative of medieval men by medieval methods, some but parliamentary tombstones, marking the graves of local (English) evils of a temporary character, have been invoked in Canadian litigation—put forward as having been introduced here by colonial enactment, 32 Geo. III. c. 1.

Somewhat of this sort, was the statute passed in 5 Eliz. (c. 4), making void, in the interests of the guilds, articles of apprenticeship for a less term than seven years. It was the first statute upon which argument seems to have been had, and in three early cases it received consideration. In the first (*g*) of these cases, Robinson, C.J., said: "The provisions of the statute . . . are no longer part of the law of England; they have been repealed (*h*) as impolitic even in the condition of that populous country. In my opinion, these provisions were never part of the law of this province." In the second (*i*), Sherwood, J. (delivering the judgment of the court), says, after referring to the terms of 32 Geo. III. c. 1 (U. C.):

"The intention and meaning of the legislature undoubtedly was, that resort should be had to such of the laws of England as are applicable to the state of society in a British colony, which is very different in many respects from the state of society in England. Courts of justice are to decide on the applicability of the law to any particular case, when doubts arise on the subject; and upon the same principle, they must decide upon the adaptability of any particular law of England to this province, in a general point of view. The statute 5 Eliz. c. 4, is entitled, "An Act containing divers orders for artificers, laborers,

(*g*) Fish v. Doyle, Drap. 328 (1831).

(*h*) By 59 Geo. III. c. 96.

(*i*) Dillingham v. Wilson, 6 U. C. Q. B. (O. S.) 85 (1841).

servants of husbandry, and apprentices"; and the Act itself, from beginning to end, contains internal evidence that no resort can be properly had to it, within the scope and meaning of our Provincial Act already mentioned, as a rule for deciding the manner in which apprentices are to be bound in this province, and the legal effect of such binding. That Act was obsolete in England even before the statute which repealed it. . . . . We consider the statute of 5 Eliz. c. 4, as a local Act, which was probably adapted to the state of society in England three hundred years ago, but is not now, and never was, adapted to the population of a colony, and was never in force here."

In the third case (*j*), it was broadly contended: "The court can not say, that these statutes are not in force; it is not a question of their applicability that is to be decided, the decision must be on the express words of a statute. When the law is to be given to a colony settled and planted by British subjects, we can understand that only such parts of the English statute law as are applicable shall be declared to be in force; but when the statute law is introduced by legislative enactment, there can be no question about the applicability of statutes, as the legislature have shown that their determination was to introduce them all, with the exception of those parts which are expressly excepted." In delivering the judgment of the court, Chief Justice Robinson says:

". . . . . It cannot possibly admit of doubt that its provisions are inapplicable to any state of things that ever existed here; a clause here and there might be carried into effect in this colony, or anywhere, from the general nature of their provisions; but that is not sufficient to make such a statute part of our law, when the main object and tenor of it, is wholly foreign to the nature of our institutions, and it is there-

(*j*) Shea v. Choat, 2 U. C. Q. B. 211 (1845). The head-note is misleading. In speaking of 20 Geo. II. c. 19, Robinson, C.J., says: "My inclination at present is that that statute in its present scope and bearing is *not* applicable to this province"; but he decided that, even if in force, the pleading could not be supported, not showing a case within the statute.

fore incapable of being carried, substantially and as a whole, into execution."

These cases distinctly affirm, that (leaving out of consideration the Poor and Bankruptcy laws) (*k*) not every English statute in force in England in 1792, even though such statute was, in a sense, of general application in England, is in force here under the terms of 32 Geo. III. c. 1—that a recognition must be accorded, so to speak, to the differences of environment, and that the courts of Upper Canada should consider the question of the adaptability of any English Act "to the nature of our institutions." To some extent, this view of the effect of 32 Geo. III. c. 1, has not met with entire approval by individual judges in subsequent cases; but, as will be seen, the decided tendency of the authorities has been to support the principle laid down in these three cases.

Baldwin v. Roddy (*l*) involved the question as to the English Act "for the removal of causes from inferior courts" (19 Geo. III. c. 70). That Act "seemed designed in England to supply a defect which parliament occasioned when they took away arrest from inferior courts in cases under £10"—the process of those courts could be evaded by the removal of a debtor's effects from the limits of their jurisdiction—and it was held by Robinson, C.J., to be introduced here. "It is a reasonable and good provision, general in its nature; not confined as to locality; not confined to certain courts, or to any amount of judgment, nor incumbered with any forms or requisitions inapplicable to the nature of our courts."

In 1836, the question arose (*m*), whether the British statute (22 Geo. II. c. 40), "for the more effectually

(*k*) Expressly excepted by 32 Geo. III. c. 1 (U. C.) s. 6.

(*l*) 3 U. C. Q. B. (O. S.) 166; and see Gregory v. Flanagan, 2 U. C. Q. B. (O. S.) 552.

(*m*) In Leith v. Willis, 5 U. C. Q. B. (O. S.) 101; followed in Heartly v. Hearns, 6 U. C. Q. B. (O. S.) 452.

restraining the retailing of distilled spirituous liquors," the 12th section of which denied all right of action to any one selling less than 20 shillings worth at one time, was to be considered in force in Upper Canada or not. The Act contained 32 clauses, as to all of which (other than the 12th section) Robinson, C.J., said: "Not one with any reason can be considered as applicable to this province"; and as to that section he said:

"Upon a view of the whole case, though I feel it difficult to rest a decision upon a perfectly clear ground, I am of opinion that the British Act does not prevent the plaintiff recovering. It was passed in England to meet a particular evil, which was stated to be increasing *there of late among a particular class of the inhabitants*. We cannot say judicially that the circumstances so far correspond in this province, as to make it a reasonable intendment that a statute passed to meet such exigency in England, is to be treated as a part of the general statute law of England, intended to be introduced into this province."

upon the further ground, too, that the Provincial Act 3 William IV. c. 1, made provisions inconsistent with the provisions of the British Act—probably the safer ground for decision upon fixed principle—the latter was held not in force here.

The English statute 9 Geo. II. c. 36—commonly classed as one of the Mortmain Acts—has been under review in a number of decided cases; and in the argument of counsel and the opinions of the judges, will be found all the considerations which can be urged in support of the two different views—those who would uphold the Act as being introduced here by the Provincial Act 32 Geo. III. c. 1, urging that because the English laws relating to the poor and to bankruptcy, were in terms excluded, the maxim "*expressio unius exclusio est alterius*" should be applied, and all other English Acts of general application in England, held to be in force in Upper Canada; while those who denied the binding force

of the statute here argued for a more limited introduction of the English law. The latter view clearly prevailed, and the various considerations urged in its support, will appear from a review of the cases. In the result, the statute was decided to be in force in Upper Canada, but only on the ground of its implied *recognition by our colonial legislature*; the view of a decided majority being, that it was not introduced by the sole force of 32 Geo. III. c. 1. In deciding in favor of the propriety of making comparison between the different situations, material and social, of the mother country and the colony, as well as in treating colonial recognition as a good ground for holding an Imperial Act in force in a colony, the courts of Upper Canada (Ontario) have practically adopted the view of Robinson, C.J., that the terms of the Act 32 Geo. III. c. 1 (U. C.), "do not place the introduction of the English law on a footing materially different from the footing on which the laws of England stand in those colonies in which they are merely assumed to be in force, on the principles of the common law, by reason of such colonies having been first inhabited and planted by British subjects" (*n*). This is the construction to which reference was a short time ago made, as placing Ontario upon the same line in this matter as the maritime provinces, and (as we shall point out) the more lately acquired provinces of the Dominion of Canada.

The leading case, as to this statute of Mortmain, is *Doe dem* Anderson v. Todd, decided in 1845, from which we have already quoted, and which has been followed in a number of subsequent cases up to 1876, when the Court of Appeal for Ontario, upon a careful consideration of the whole subject, established the decision in the earlier case. To attempt to set forth the views of Robinson, C.J., in language other than his own, would so weaken their effect, that we feel constrained to quote his opinion somewhat at length:

(*n*) *Doe d.* Anderson v. Todd, 2 U. C. Q. B. at p. 86.

"The question is then left to be determined whether the devise made by that will to a charitable use is void in this country under the provisions of the statute 9 Geo. II. c. 36; that it is of such a nature as to come within the terms of that statute, cannot be doubted, and the only point, therefore, to be determined is, whether the statute is in force in Upper Canada. . . . . If this had been a colony of that description, and not a conquered or ceded country, having already laws of its own, and if the question whether the statute 9 Geo. II. c. 36, could be regarded as in force or not, had turned wholly on the point whether, upon the principles of the common law, without the interposition of any legislative enactment, that statute formed part of the law binding upon all who settled in the colony or plantation, I think we should without difficulty have held that it did not, for the reasons expressed in this passage of the commentaries (*o*), and which received the sanction of a judicial decision, in the case of The Attorney-General v. Stuart, 2 Mer. 144. from a very eminent judge (Sir W. Grant), and in reference to the very statute now under consideration. But it is plain that the question does not rest here on that footing, and though the case of Attorney General v. Stuart may appear very material to its decision, it cannot be so upon the footing that this is a colony planted originally by British subjects, to which all who have come, have brought the law of England as their birthright, but it may be material as illustrating the extent and effect which should be given to the words of a provincial statute introducing the law of England, which statute, after all considerations are stated, must form the foundation of our decision. The country in which this question rises formed part of the conquered province of Canada, ceded by the French government, by the Treaty of Paris, 10th July, 1763, and in which, therefore, after the cession, it was in the power of the Crown, independently of the legislature (*p*), to have introduced either the laws of England, or any other; but the laws before enjoyed by the conquered people would

(*o*) Of Blackstone, from which full extracts have already been taken; see *ante*, p. 78 *et seq.*

(*p*) See Chap. VI. *post*, for a reference to the contention to the contrary raised in Lower Canada.

prevail until such introduction. These principles are clearly and precisely stated by the Master of the Rolls (2 P. Wms. 75) to have been determined by the Lords of the Privy Council, on an appeal to the king in council from the foreign plantations. ' Lord C. J. Holt assents to them, in emphatic terms, in Smith v. Cooper, 1 Salk. 666, where he says, ' the laws of England do not extend to Virginia; being a conquered country, their law is what the king pleases.' I do not, however, understand in what sense his Lordship speaks of Virginia as a conquered country. In 1 Salk. 44, the principles we are considering are again stated by Lord C. J. Holt, and were elaborately set forth in modern times by Lord Mansfield, in the well-known case of Campbell v. Hall, 1 Cooper, 204. The proclamation of October, 1763, on the effect of which that judgment proceeded, was an act of the Sovereign, introducing the law of England, in general terms, into countries ceded by the Treaty of Paris; but, by some inadvertence, the territory which was then formed into the Province of Quebec, was so described in that proclamation as to exclude the greater part of Canada, in regard to which no provision was made for its civil government. This omission is noticed in the preamble to the British statute 14 Geo. III. c. 88. If the territory which lately formed Upper Canada, and in respect to which the question now before us has arisen, had been included within the limits given by that proclamation to the Province of Quebec, and if to this moment we had been left to the effect of that proclamation, which assured to the inhabitants ' the enjoyment of the benefit of the laws of England,' and directed that all causes, criminal and civil, should be determined according to law and equity, and *as near as may be, agreeable to the laws of England*, then the question would have been, whether in reason we should hold that any other laws were introduced by those general words than such laws as English colonists, planting a newly discovered country, would, on the principles of the common law, have carried with them; and, in considering that point, the observations of Sir William Grant, in Attorney-General v. Stuart, would have strongly applied, and might, indeed, have been taken as direct authority. Then, how does the question stand on the real facts of the case? The British statute 14 Geo. III. c. 88, noticing

the defect in the proclamation of the 7th of October, 1763, enlarged the limits there assigned to the Province of Quebec, and made them clearly embrace the country now involved in this question (if not the whole of Upper Canada); and parliament, by that Act, for the satisfaction of her Majesty's Canadian subjects, provided that within the whole of the territory thus defined, in all matters of controversy relative to *property and civil rights* (*q*), resort should be had to the laws of Canada (that is, the laws which prevailed in Canada before the conquest), for the decision of the same. This gave a new starting point with regard to the question, and puts an end to all doubts which might have arisen under the proclamation, which, in this respect, was wholly abrogated. The statute 31 Geo. III. c. 31, which divided the Province of Quebec, and gave to Upper Canada a distinct legislative body, and did not by anything contained in it affect the terms of this question, left the French-Canadian law in force, but it created a legislature, with power to make laws for the peace, welfare, and good government of the province, and which, under the very general terms of that authority, might alter or abrogate the existing law, if it thought proper. In the first statute passed by this legislature, 32 Geo. III. c. 1, that was done which, no doubt, was anticipated and intended as the consequence of erecting Upper Canada into a separate province. Reciting that the provision made by the 14 Geo. III. c. 83, had been 'manifestly intended for the accommodation of his Majesty's Canadian subjects,' and that the territory comprising Upper Canada had become inhabited principally by British subjects, unaccustomed to the law of Canada, it repealed the provision in the 14 Geo. III. c. 83, so far as it had the effect of introducing the French law into Upper Canada, and enacted, that 'from and after the passing of that Act, in all matters of controversy relative to property and civil rights, resort should be had to the laws of England, as the rule for the decision for the same. And that all matters relating to testimony and legal proof in the investigation of fact, and the forms thereof, in the several courts of law and equity within this province, shall be regulated by the rules of evidence established in England'; with a proviso that the

(*q*) See Citizens v. Parsons, L. R. 7 App. Cas. 96.

Act 'should not be construed to interfere with the subsisting provisions respecting ecclesiastical rights or dues within the province, or with the forms of proceedings in civil actions, or the jurisdiction of the courts already established,' or to introduce 'any of the laws of England respecting the maintenance of the poor, or respecting bankrupts.' On this foundation rests our right to the enjoyment of the laws of England, except as regards the criminal law, which, having been introduced by the royal proclamation into the province of Quebec as there defined, was afterwards, by the statute 14 Geo. III. c. 88, extended to the whole territory (including Upper Canada), which was by that Act made to constitute the Province of Quebec, and has ever since been allowed to continue in force there; being expressly recognized in Upper Canada by 40 Geo. III. c. 1 (*r*), and modified by that and many subsequent statutes. Except for the purpose of tracing the history of the introduction of the laws which govern this colony, it was unnecessary to the decision of the point before us, to have gone further back than the statute 32 Geo. III. c. 1; whatever was done before cannot affect the question, though some things which have been done afterwards may. Then, looking in the first place at the words of this statute, it is my opinion that they do not place the introduction of the English law on a footing materially different, as regards the extent of the introduction, from what would have been, or rather from what was the effect of the proclamation of 7th October, 1763, in those territories to which it extended, or from the footing on which the laws of England stand in those colonies in which they are merely assumed to be in force on the principles of the common law, by reason of such colonies having been first inhabited and planted by British subjects. The restrictions intimated in the passage which I have cited from the commentaries and the reasons of Sir Wm. Grant, in the case of Attorney-General v. Stuart, apply, I think, in the case of an introduction by express enactment in such general terms, as well as in the other case. It would have been hardly possible for the legislature to have excepted, in special terms, all those British statutes which, being inapplicable to the con-

(*r*) See *post*, p. 123 *et seq.*

dition of the colony, they might not wish to include as parts of the law of England. And it is impossible to allow that they could have intended, by the words they used, to embrace every provision in the British statute book which they did not specially except. It is true, indeed, that they have made some special exceptions; in their enactment they have been careful to provide that we are not, under the general words used by them, to take the English poor laws and bankrupt laws with the rest; these were both of them systems of law framed wholly by English statutes. It cannot be denied to be a maxim that '*mentio unius exclusio est alterius.*' And it may be said that the legislature, in making these two exceptions, evinced their impression, that, if they had not made them, the poor laws and bankrupt laws would, under the words which they had used before in the statute, have been introduced into the province. The argument, consequently, applies *quantum valeat;* but I am of opinion that we cannot allow it so much force as to admit that every English statute of a general nature, not excepted, is in force because it was not excepted. The legislature, looking on the poor laws and bankrupt laws as unsuited to the condition of the colony, were determined to leave no room for doubt as to their exclusion; and, therefore, for greater caution, expressly excepted them; but if we were, therefore, now to hold that all statutes which they have not excepted, and which could by their nature be enforced here, must, therefore, be binding upon us, we should be making great, and, I fear, absurd, changes in our system of laws, as it has been always hitherto received and acted upon here. The game laws, for instance, are not excepted in the statute; nor the statutes which disable persons from using a trade who have not served seven years apprenticeship (*s*), nor any of the multitude of acts relating to certain trades and manufactures; and, indeed, it would be easy to enumerate a long list of statutes, all actually capable of being acted upon in this country, but which, having been passed upon grounds and for purposes peculiar to England, and either wholly or in a great degree foreign to this colony, have never been attempted to be enforced here, and have never been taken to apply to us. And, indeed, several occasions have arisen in

(*s*) See *ante*, p. 98.

which this court has determined, with respect to certain British statutes passed before our provincial statute 32 Geo. III. c. 1, that they formed no part of the law of this province, not having provisions in their nature applicable, and such as it could be supposed the legislature intended to introduce under the general words used by them; these words, too, it must be remarked, are not such as expressly introduce the whole civil law of England; they seem rather intended to be more prudently limited to the purpose of giving the principles of English law, modified, of course, as they may have been by statutes, as the rule of decision (*t*) for settling questions as they might arise relative to property and civil rights. Still it must be confessed that a wide field is opened for disputes by the term civil rights. Among a man's civil rights it may be argued is the right of disposing of his property as he thinks fit. And when he has made a disposition of it, the legality of which is questioned, that seems to present a point which must be solved, since our statute 32 Geo. III. c. 1, by conceding what a man in the exercise of his civil rights might in such a case do in England, and taking that as the rule for deciding the controversy between the persons claiming under the disposition which may be questioned, and the person who would be entitled to the property as the representative of the deceased, if he had not the power to dispose of it as he has done. To decide these constitutional points, for such they are, upon principles so manifestly clear and consistent as to keep free from all appearance of conflicting decisions, is more, I apprehend, than it can be hoped to attain. That *misera servitus* which is said to exist where '*jus est vagum*' is so justly dreaded in these times, that no one can consent to admit that there exists in any tribunal an arbitrary discretion to say what British statutes shall be in force here, and what not; and yet, on the other hand, in the present state of our jurisprudence, there cannot be said to be any other method of settling all these doubts as they arise, *than for courts of justice to determine them, not by any arbitrary exercise of their will, for they can claim no*

(*t*) See Moulson v. Commercial Bank, 2 U. C. Q. B. 338, involving the question how far the English Bankruptcy Act was introduced by the first Canadian Bankruptcy Act, which used much the same form of expression.

such right, but upon the best views which they can take of arguments which cannot in their nature lead to any clear and incontestable conclusion (*u*). To repeat what I have already quoted from Mr. Justice Blackstone, 'What shall be admitted and what rejected, at what times and under what restrictions, must, in case of dispute, be decided, in the first instance by the provincial judicature, subject to the revision and control of the King and council,' and we may add, subject also to any express provision which the legislature of the mother country, or of the province, may think fit to make. With regard to this particular statute, 9 Geo. II. c. 36, when I consider the English decisions as to what are charitable uses within the intention of the Act, I cannot persuade myself that there have not been many dispositions made in this province of property, both by deed, and by will which would be held to come within the prohibitions of the statute, but which have nevertheless been acquiesced in and executed without question. In the case of *Doe dem.* McDonald and others v. McDougall in this Court, Trin. Term, 3 & 4 Will. IV., the question whether this statute was in force here was discussed, and as far as I know, for the first time. The point was not determined in that case, for the judgment proceeded on other grounds of objection, which prevailed; but I recollect that I formed and expressed an opinion upon it, and that, looking to the reason of the thing, and fully concurring in the sentiments which had been delivered by Sir W. Grant, in the case of Attorney-General v. Stuart, I was disposed to look upon the statute as not binding in this province, and that would still be my opinion, if the point were left to depend wholly on the effect of our statute 32 Geo. III. c. 1. I think the reasoning of the Master of the Rolls, as applied to the particular provisions and exceptions in that statute, is obvious and irresistible, and that it should lead us to say, that the legislature, if they had given no other evidence of their intention than is to be found in statute 32 Geo. III. c. 1, did not intend by that Act to introduce the statutes of Mortmain, among which the 9th Geo. II. is usually, though not very accurately, classed. But my opinion is that we cannot properly hold that opinion now, after the legislative

(*u*) Compare with this the language of Mr. Justice Hill, in Nova Scotia, *ante*, p. 87.

exposition which has been afforded, and especially in recent times, of the assumed effect of that statute. The legislature, it is admitted, are the best interpreters of their own laws, and to say nothing of other evidences they have given of their understanding upon this point, by the Church Temporalities Act passed in 3 & 4 Vic. c. 78, they have provided that lands may be conveyed to such uses, for the benefit of the United Church of England and Ireland in this province, as would clearly have been prohibited by the British statute 9 Geo. II., and they have shown it to be their understanding that without such express legislative authority, the English statutes of Mortmain would have restrained parties from making such a disposition, for they have added the words 'the Acts of parliament commonly called the statutes of Mortmain, or other Acts, laws, or usages to the contrary thereof notwithstanding,' 9 Geo. II. c. 36, being commonly regarded as one of these statutes of Mortmain; but the legislature not being really anxious to relieve parties in this instance entirely from its restrictions, they accompanied the authority given by the Act with limitations in the same spirit, though not to the same extent, as those contained in the 9 Geo. II. c. 36. They only give validity to deeds conveying lands to the use of the church, provided such deeds shall be made and executed six months at least before the death of the person conveying the same, and shall be registered within six months after his decease. The recognitions by the legislature to which I have alluded, are subsequent to the discussion of the question in *Doe dem* McDonell *et al.* v. McDougall *et al.*, whether the statute 9 Geo. II. c. 36, was or was not binding in Upper Canada. We can hardly suppose a point more especially within the province of the legislature to decide, than whether a particular part of the statute law of England is or is not so far in its nature applicable to the state of things in this province, that it may in reason be considered to be included within the operation of the statute which they had themselves passed, introducing the law of England relative to property and civil rights.

"If, after the Church Temporalities Act, which I have particularly referred to, and which certainly is based on the assumption of the statutes of Mortmain being in force here, we

were to hold that the statute in question, 9 Geo. II. c. 36, is not in force, then this incongruity would follow, that while people would be restricted from conveying lands to religious and charitable uses connected with the Church of England, in any other manner than by a deed made six months before the death of the grantor, and registered within six months after, they might convey their lands to religious and charitable purposes connected with any other denomination of Christians, without any restrictions whatever, and might devise all their estates to such uses, even upon their death-beds. What is said by the Master of the Rolls, in Curtis v. Hutton (*v*), very strongly, accords with this view of the case. If the legislature had left the subject of Mortmain untouched, making no reference to it in any of their Acts, then I think for the reason given by Sir W. Grant, in Attorney-General v. Stuart, we should have held that the statutes of Mortmain were not introduced by the provincial statute 32 Geo. III. c. 1; but to treat them as inapplicable to this province, and on that ground to keep them wholly out of view, after what the legislature has done in contemplation of their being in force, would lead to greater inconveniences and inconsistencies than those which Sir William Grant has pointed out as arguments against their being held generally inapplicable to the colonies. We ought, in my opinion, now to take into our view all that the legislature has done bearing on this question; and doing so, we must hold that the statute 9 Geo. II. c. 36, is part of our laws, and that under it the disposition made by the testator by the will in this case is void, and that the estate has consequently devolved on the heir-at-law, the lessor of the plaintiff."

It should be remarked, however, that Jones and McLean, JJ., appear to have entertained the view that the statute in question was introduced by 32 Geo. III. c. 1, as being a part of English law *capable of application* to Upper Canada, but both treat the question of applicability as one proper for consideration. McLean, J., puts it thus:

"It is evident from the words of the statute, that they '*shall form the rule*' for such decisions, that the legislature must have

(*v*) 14 Ves. 541.

been well aware that in very many other matters, as well as in reference to the Poor and Bankrupt laws, the laws of England were wholly inapplicable to the circumstances of this province, and could not therefore be introduced as a body of laws to be enforced in all cases. They are therefore only to form the rule in all matters in which they can properly and reasonably be brought into operation here. The statutes of Mortmain form a part of the law of England introduced as the rule of decision in all cases coming under their operation, and there is nothing to prevent their application to the circumstances of the country." on the effect of subsequent legislative recognition they agreed with the Chief Justice, and the unanimous judgment of the court was that the statute had the force of law in Upper Canada.

The general tenor of the decisions in the other cases involving a consideration of this statute down to 1876, will sufficiently appear by the following extract from the argument of counsel in the case in appeal about to be noted: "Hallock v. Wilson (*w*) follows *Doe* Anderson v. Todd, and proceeds on the ground that registration is substituted for enrolment, and that the statute 9 Geo. II. c. 36, is in force, because certain provincial statutes have recognized it as being in force. Mercer v. Hewston (*x*) expresses a doubt whether the statute is in force. That decision follows *Doe* Anderson v. Todd, as being the law until otherwise determined by the Court of Appeal. Anderson v. Dougall (*y*) and Anderson v. Kilbourn (*z*) do not discuss the question whether the statute is in force or not; and Davidson v. Boomer (*a*) concedes that the statute is in force in this province, following *Doe* Anderson v. Todd; but in Hambly v. Fuller (*b*) the judgment only states that it must be held that the statute is in force, upon the above authorities, until otherwise decided by the Court of Appeal.

(*w*) 7 U. C. C. P. 29.
(*x*) 9 U. C. C. P. 349.
(*y*) 13 Grant, 164.
(*z*) *Ib.* 219.
(*a*) 15 Grant, 1, 218.
(*b*) 22 U. C. C. P. 142.

Ferguson v. Gibson (*c*) follows the above authorities without discussing whether the Act is in force or not."

The whole matter came finally before the Court of Appeal for Ontario in the case of Whitby v. Liscombe (*d*). The opinions delivered by the eminent judges who decided the case show the same marked difference of opinion as was apparent in the early case—a decided difference in principle—although the judgment of the court was unanimous that the statute is in force in Ontario, because all agreed in holding that the legislative recognition of its binding force here (particularly *since* 1845) was sufficient to incorporate it amongst the laws of Ontario (*e*). Chief Justice Draper expresses a clear opinion that the provincial statute 32 Geo. III. c. 1, was sufficient, *per se*, to introduce the Mortmain Acts, and from his language it might even be argued that he considered the question of applicability not open: "The question before us is whether our legislature have not made it part of our laws; and but for the case of Attorney-General v. Stewart, I should never have entertained a doubt on this point." And again, referring to the English laws as to the poor and to bankruptcy, and another statute subsequently excluded, he says: "The reason given, that the provisions of those Acts were inapplicable to this province, is virtually one of the reasons for Sir W. Grant's judgment in the Attorney-General v. Stewart; but our legislature evidently did not doubt that their first Act had introduced both these British statutes into Upper Canada." On the other hand, Mr. Justice—afterwards Chief Justice—Moss, agreed fully with the view expressed by Robinson, C.J., in the early case, that by the effect of our provincial Act 32 Geo. III. c. 1, *per se*, the Act in question was not in force. Reviewing that case, he said:

(*c*) 22 Grant, 36.

(*d*) 28 Grant 1.

(*e*) Only on this ground is Reg. v. Gamble and Boulton, 9 U. C. Q. B. 546, supportable. See notes to B. N. A. Act, ss. 18 and 69 *post*.

"The question of principal interest in this case is whether the statute commonly called the Mortmain Act is in force in this province. More than thirty years ago the Court of Queen's Bench, upon full consideration, held that it was in force. Since that time, in express deference to that authority, the Courts of Common Law and the Court of Chancery have decided many cases, and many devises and bequests to charitable uses, otherwise unimpeachable, have been adjudged invalid. The point is now for the first time raised in a Court of Appeal. So many estates have been administered and so many titles have been acquired upon the assumption of the correctness of a decision which had been followed so often by courts of co-ordinate jurisdiction, and remained so long unchallenged on appeal, that its reversal would be attended with serious consequences. Under such circumstances, it would deserve consideration whether the case was not a fitting one for the application of the rule—*stare decisis*. . . . If the only question was whether *Doe* Anderson v. Todd was well decided, I should hesitate long before holding in the affirmative. The points then presented for determination were, whether the provincial statute 32 Geo. III. c. 1, should have been judicially interpreted to have the effect of introducing the Mortmain Act, and, if not, whether subsequent legislation had effected a change in the law. Robinson, C.J., was of opinion that but for subsequent legislative exposition, the true interpretation of the statute of Geo. III. excluded the Mortmain Act, while the other members of the court seemed to have entertained a different view. The reasoning of the Chief Justice appears to me to be unanswerable—at least, if the decision of Sir Wm. Grant, in Attorney-General v. Stewart, is correct, and, apart from its intrinsic force, it would be hopeless to impugn this, after its approval by the House of Lords, in Whicker v. Hume *(f)*. It was attempted in the argument of this appeal to distinguish *Doe* Anderson v. Todd, and withdraw it from the application of the principles enunciated in the two English cases. I do not think the attempt was attended with success. It proceeded upon the differences in the terms employed in introducing the laws of England into this province, and into Grenada and New South Wales respectively. Our statute enacted that

(f) 16 Jur. 89.

'in all matters of controversy relative to property and civil rights, resort should be had to the laws of England, as the rule for the decision of the same.' In Grenada, justice was to be administered, as near as might be, according to the laws of England. In New South Wales, the laws in force in England, 'so far as they can be applied within the said colonies,' were introduced. Sir Wm. Grant held that 'the question of whether the statute was in force in Grenada depended upon this consideration—whether it be a law of local policy, adapted solely to the country in which it was made, or a general regulation of property, equally applicable to any country in which it is by the rules of English law that property is governed;' and, having discussed the scope of the statute, he decided it to be local in its character, and not a general regulation of property. In Whicker v. Hume, Lord Cranworth emphatically says: 'With regard to this statute of Mortmain, ordinarily so called, I cannot have the least doubt that that cannot be regarded as applicable to the colonies.' This being the construction placed upon the statute by such high authorities, the respondents were forced to the broad construction, that *all* the laws of England relative to property and civil rights, whatever might be their historical origin, or however political their character, or however clearly they grew out of local circumstances, or were meant to have a local operation, were introduced. The observations of the Chief Justice, in *Doe* Anderson v. Todd, seem to me to effectually dispose of this proposition. As he points out, the language of the statute does not expressly introduce the whole civil law of England, but seems to be limited to the purpose of giving the principles of the English law as the rule of decision for settling questions, as they might arise, relative to property and civil rights: If this be the correct view, I cannot perceive that any substantial distinction can be founded upon the differences of language to which I have referred."

He, however, doubted the propriety of the decision in that case, as founded on too slight a legislative recognition of the Imperial Act as being in force here, and concluded his opinion by saying: "It is upon the ground of this *subsequent* legislative recognition that I wish to place my

judgment, that the statute must now be held to be in force in this province" (*g*).

Stark v. Ford (*h*) is the rather amusing record of an unsuccessful attempt to subject a Canadian judge to the penalties provided in the Act "for abolishing the Court of Star Chamber," 16 Car. I. c. 10. Upon examination of the statute, Robinson, C.J., points out that its whole scope was to forever put a stop to the unconstitutional usurpation of judicial functions by the Court of Star Chamber, and ridiculed the idea of extending it to a judge alleged to have acted illegally in the exercise of his assigned duties.

At the date of the passing of the Provincial Act, 32 Geo. III. c. 1, the law of marriage,—both as to the forms to be observed, and as to the disabilities which would prevent its solemnization in certain cases,—in force in Great Britain, was regulated by the statute commonly known as Lord Hardwicke's Act, 26 Geo. II. c. 33. Since 1792, many provincial statutes have made provisions on many, if not most, of the matters legislated upon by Lord Hardwicke's Act (*i*); but, as late as 1887, the latter statute has been expressly recognized as introduced—as a whole—by our first provincial Act. The reasons given for so considering it in force, constitute the material matter for us in this enquiry, and by way of contrast we may note the reasons given for holding—as has in 1889 been finally held—that section 11 of the Act was never introduced into our law.

"That section rendered such marriage by license"—*i.e.*, of a minor without consent of parent or guardian—"absolutely void, without any sentence of the court; and length of cohabita-

(*g*) See Smith v. Methodist Church, 16 O. R. 199; Butland v. Gillespie, *ib.* 486.

(*h*) 11 U. C. Q. B. 363.

(*i*) The whole matter has never been taken up by our legislatures because of the differences in religious view on the question in Upper and Lower Canada respectively; and note the division of the subject between the Dominion and the provinces under the B. N. A. Act, s. 91, s-s. 26, and s 92, s-s. 12.

tion and birth of children afforded no ground of exemption (*j*); and consent subsequently given would not avail to validate. This rigorous law was soon after repealed in England, and no judge has regarded with favor the proposal to hold it applicable to this country. Judicial opinion as reported is all the other way."—*Per* Boyd, C., in Lawless v. Chamberlain (*k*). "Whether the 11th section of the Act containing that provision was ever part of the law of this province, by virtue of our adoption of the law of England, may fairly be questioned. If it ever was, it must be so still, as we have already mentioned, because the English statute repealing it is of too modern a date to be binding upon us by virtue of our statute 32 Geo. III. c. 1, and it has no relation to the colonies; but it would be difficult to satisfy ourselves, we think, that it ever has been in force in Upper Canada, on account of the impossibility of applying the 12th clause to the condition of things here. We could not therefore have the enactment respecting the consent of parents in its integrity, and as it would work great hardship to have the 11th clause in force without the 12th or any other provision as a substitute for it, we shall, perhaps, if we find it necessary in any case to determine the point, find it right to determine that neither of these clauses could be taken to form part of our law of marriage under our own adoption of the law of England by 32 Geo. III. c. 1."—*Per* Robinson, C.J., in Reg. v. Roblin (*l*).

The reasons given on the other hand for holding the Act, other than the clauses in question, to be introduced here, will appear in the following passages extracted from the opinions of Robinson, C.J., Esten, V.C., and Armour, C.J., in three cases in which those judges had the question under consideration:

"When by our statute 32 Geo. III. c. 1, the provincial legislature adopted the law of England as the rule of decision . . . they adopted to the extent mentioned, not merely the common law of England, but also the statute law, with the

(*j*) Johnstone v. Parker, 3 Phill. 41. (*k*) 18 O. R. at p. 309.

(*l*) 21 U. C. Q. B. at p. 351. See Reg. v. Secker, 14 U. C. Q. B. 604, and Reg. v. Bell, 15 U. C. Q. B. 287.

exceptions specified in the Act, and with other exceptions, though not specified, of such laws as are clearly not applicable to the state of things existing in the colony, of which various examples might be cited.

"We consider that our adoption of the law of England to the extent and with the exceptions just mentioned, included the law generally which related to marriage. The statute 26 Geo. II. c. 33, being in force in England when our statute was passed, was adopted, as well as other statutes, so far as it consisted with our civil institutions, being part of the law of England at that time 'relative to civil rights'; that is, to the civil rights which an inhabitant of Upper Canada may claim as a husband or wife, or as lawful issue of a marriage alleged to have been solemnized in Upper Canada.

"The legislature of Upper Canada have so regarded this matter, as appears by the statute 33 Geo. III. c. 5, secs. 1, 3 and 6; 38 Geo. III. c. 4, s. 4; and 11 Geo. IV. c. 36, in which they have recognized the English Marriage Act, in effect, though not in express terms, as having the force of law here in a general sense, and controlling the manner in which marriage is to be solemnized."—*Per* Robinson, C.J., in Regina v. Roblin (*m*).

"No doubt the Act of the 32nd of the late King, introduced all the law of marriage as it existed in England at that date, excepting, perhaps, some clauses of the 26 Geo. II. c. 33. It introduced the Acts 25 Hen. VIII. c. 22; 28 Hen. VIII. c. 7 & 16; and 32 Hen. VIII. c. 38, so far as they remained in force, and so much of the canon law as had been adopted by the law of England."—*Per* Esten, V.C., in Hodgins v. McNeil (*n*).

"The legislature of this province has repeatedly recognized that Act as being in force in this province, by from time to time passing laws modifying and qualifying its provisions. See 33 Geo. III. c. 5; 38 Geo. III. c. 4; 2 Geo. IV. c. 11; 11 Geo. IV. c. 36.

"Having regard to the provisions of the Acts 32 Geo. III. c. 1, and 40 Geo. III. c. 1, to the cases above referred to, and to the recognition thereof by the legislature of this province, as above mentioned, I am clearly of opinion that the Act 26 Geo. II. c. 33, was brought into force in this province by the Acts

(*m*) 21 U. C. Q. B. at p. 355. (*n*) 9 Grant, at p. 309.

32 Geo. III. c. 1, and 40 Geo. III. c. 1, so far as its provisions were applicable to the circumstances of this province, and were not inconsistent with the civil institutions thereof; and that, at all events (which is all that I am concerned with in this case), the provision thereof making all marriages which should be solemnized without publication of banns or license of marriage from a person or persons having authority to grant the same, first had and obtained, null and void to all intents and purposes whatsoever, was brought into force.

"Unless this provision was so brought into force in this province, there is no provision in this province making void a marriage so solemnized, and the fact that the legislature of this province has never deemed it necessary to make any such provision, is cogent evidence that it considered it unnecessary to do so; because this provision of 26 Geo. II. c. 33, was treated by it as being in force in this province."—*Per* Armour, C.J., in O'Connor v. Kennedy (*o*).

From the above cases it will be seen that in reference to Lord Hardwicke's Marriage Act the same principles were invoked as in reference to the Mortmain Acts. In each case the court considered:

1st. Is the British statute one which can be considered as so applicable to the circumstances of this colony, that the legislature must have intended to introduce it by the intrinsic effect of their Act 32 Geo. III. c. 1? This question, in the case of the Mortmain Acts, does not seem to have been unanimously answered by Canadian judges, but the weight of authority would appear to be for a negative answer—in conformity, as will have been noticed, with English decisions. As to the Marriage Act of Lord Hardwicke, there seems to have been no difference of opinion—all agreeing in the result arrived at, in favor of an affirmative answer, except as to the 11th and 12th clauses.

2nd. Has there been subsequent legislative recognition by the provincial parliament, of the binding force here of the Act in question? As to both Acts, the answer has been

(*o*) 15 O. R. at p. 22.

unanimously in the affirmative. To these considerations may be added:

3rd. Have the decisions of provincial courts proceeded so clearly upon one line, and for such a length of time, as to have established a rule of law in regard to dealings with property, or in regard to the *status* of particular classes of persons? In the later cases there can be no doubt this consideration operated most powerfully. In Whitby v. Liscombe (*p*), in 1876, Mr. Justice Burton uses this language; "Where solemn determinations which establish a rule of property have been acquiesced in for so long a period, a court even of last resort should require very strong grounds for interfering with them"; and Mr. Justice Patterson, speaking of *Doe* Anderson v. Todd, says: "It has been acquiesced in too long, and has for too long a period governed titles to land in this province to be now interfered with by any authority short of legislative enactment"; and we have already quoted the opinion of Mr. Justice (afterwards Chief Justice) Moss, in which the same rule of expediency is expressed in those polished periods by which his written opinions are always characterized.

The case Hesketh v. Ward (*q*), brings into prominence another question proper for consideration, in deciding whether or not a particular Imperial Act (we are of course dealing with Acts in force in England on 15th October, 1792) is in force in Ontario, namely, the question—Is the Act one of general application in England, or is it local, in the sense of being confined to some particular locality or local institution in England? Upon a review of the cases already mentioned, this consideration will appear to have been always present to some extent, but in Hesketh v. Ward it was the real point for decision. The Acts in question there, were 1 Anne (st. 2) c. 6, and 5 Anne, c. 9, making certain provisions in reference, amongst other matters, to escape warrants. Richards, C.J., after a careful

(*p*) 28 Grant, 1. (*q*) 17 U. C. C. P. 667. See *ante*, p. 98.

consideration of the first-mentioned statute, decided that it was not part of our law, because "passed with reference to the peculiar position of the officers of the prisons"—the Marshalsea and the Fleet—"to which it referred, and the evils recited in the preamble, which state of things has not, and is not likely to exist in this country"; and again because "in terms it is only applicable to the two English prisons named in it; to remedy evils which the preamble . . . refers to as peculiar to persons of the descriptions there referred to, and as to which no apparent necessity exists in this country." The dissenting opinion of Mr. Justice Wilson (afterwards Chief Justice Sir Adam Wilson) is not a dissent in principle, but a joiner of issue on the facts. After a lengthy historical discussion, showing his usual painstaking research, he points out that, "Although it may have a limited application in England to the two special and peculiar prisons of the courts, it is nevertheless a general law, and a beneficial one, and an amendment of the law, and as there are no special prisons of the courts here, but all the gaols of the province are equally the prisons of the court, the statute, being such general law by the declaration of the statute itself, has an operation here upon all the prisons of the courts" (*r*).

In a series of cases it was held that the provisions of 14 Geo. III. c. 78, relating to the liability of persons upon whose premises a fire accidently starts, for damages resulting from its spreading to the premises of another, are part of our law, because they were part of the general law of England, introduced by 32 Geo. III. c. 1, and were not of local application there in the sense before referred to (*s*).

(*r*) On this principle, many English statutes referring to, *e.g.*, the courts "at Westminster" have been held to be part of *general* English law, and as such in force here in relation to our Superior Courts. See 43 Eliz. c. 6, and 13 Car. II. c. 2, as to costs in certain cases, and note the New Brunswick decisions on this point, *ante*, p. 98.

(*s*) Gaston v. Wald, 19 U. C. Q. B. 586; Stinson v. Pennock, 14 Grant, 604; Carr v. Fire Ass., 14 O. R. 487; C. S. R. v. Phelps, 14

The cases heretofore considered have had relation to the effect of 32 Geo. III. c. 1, and the phraseology employed in that Act, has been relied on in support of the contention for a limited introduction of the English statutory law relating to property and civil rights. We now turn to the Provincial Acts, by which the English criminal law was introduced into this province, and the limits of its applicability defined. As has been already noticed, the Quebec Act, 1774, (14 Geo. III. c. 83), while re-introducing the law of Canada—*i.e.*; the French law in force at the conquest—into the Province of Quebec, as described by the Act, provided for a continuation therein of the criminal law of England.

"XI. And whereas the certainty and lenity of the criminal law of England, and the benefits and advantages resulting from the use of it, have been sensibly felt by the inhabitants from an experience of more than nine years, during which it has been uniformly administered; be it, therefore, further enacted by the authority aforesaid, that the same shall continue to be administered, and shall be observed as law in the province of Quebec, as well in the description and quality of the offence as in the method of prosecution and trial, and the punishments and forfeitures thereby inflicted, to the exclusion of every other rule of criminal law or mode of proceeding thereon, which did or might prevail in the said province before the year of our Lord 1764;

S. C. R. 132. For other cases in Upper Canada (Ontario) on this subject, see Torrance v. Smith, 3 U. C. C. P. 411, and Hearle v. Ross, 15 U. C. Q. B. 259, in which 26 Geo. III. c. 86, exempting vessel owners from liability for loss through fire, was held to be part of our law; Reg. v. McCormick, 18 U. C. Q. B. 131—Nullum Tempus Act (9 Geo. III. c. 16), in force here; Dunn v. O'Rielly, 11 U. C. C. P. 404, in which the clauses in 22 Geo. II. c. 46, relating to attorneys, were held to be in force here, although other parts of the Act inapplicable (a veritable witches' cauldron, this!); Reg. v. Row, 14 U. C. C. P. 307, in which 28 Geo. III. c. 49, s. 4 (enabling a magistrate for a county-at-large to sit within a city, itself a county, within the boundaries of the county-at-large), was held not to be in force, being local in its character; Bleeker v. Myers, 6 U. C. Q. B. 134; Hart v. Moyers, 7 U. C. Q. B. 416; Garrett v. Roberts, 10 O. A. R. 650—18 Eliz. c. 5, as to suits by *informers*, in force here.

everything in this Act to the contrary thereof in any respect notwithstanding; subject, nevertheless, to such alterations and amendments as the Governor, Lieutenant-Governor, or Commander-in-Chief for the time being, by and with the advice and consent of the legislative council of the said province, hereafter to be appointed, shall from time to time cause to be made therein in manner hereinafter directed."

The Constitutional Act of 1791, while dividing the Province of Quebec into Upper and Lower Canada, left each province with the law as it stood under the Act of 1774 (except of course as altered by provincial ordinances), but gave each province a legislature empowered to make laws for the peace, welfare and good government thereof. What Upper Canada would do, was pretty well understood. As was anticipated, she annuled the old French law, and adopted the law of England as the rule for decision of all controversies relative to property and civil rights; and she not merely adhered to the criminal law of England, as introduced by the proclamation of 1763, and continued by the Quebec Act, above quoted, but she went further, and by 40 Geo. III. c. 1, enacted that "the criminal law of England as it stood on the 17th day of September, A.D. 1792, shall be, and the same is hereby declared to be, the criminal law of this province."

Under this statute, every Act of the British parliament in force as part of the general criminal law of England on the 17th day of September, 1792, was introduced into Upper Canada. The date in reference to which the English criminal law should be considered in force was thus brought forward by 18 years, and under it, as well as under the Quebec Act of 1774, the enquiry proper under the common law as to the applicability of an Imperial Act to the circumstances of a colony was eliminated, and the only enquiry is—Is the Imperial statute local in the sense we have mentioned? If not, it is part of the law of Upper Canada.

We must, however, again repeat that we are dealing in this chapter with English statutes of no express application to the colonies, and the Provincial Act, 40 Geo. III. c. 1, applies only to such statutes (*t*). Imperial Acts which, *proprio vigore*, apply to us, are treated of elsewhere. With this repeated caution, we proceed to consider some Canadian authorities upon the question of the introduction of English criminal law into Upper Canada (*u*).

In Beasley, *qui tam*, v. Cahill (*v*), it was held that the Imperial statute, 32 Hen. VIII. c. 9, against buying disputed titles, was in force in Upper Canada. It was contended that the statute was obsolete, even in England, and Robinson, C.J., remarked that this seemed to him rather singular, as the reasons assigned in the preamble of the Act for its passing, were reasons sufficient in all times; but notwithstanding that it seemed to have remained so long a dead-letter in England, he held the Act to be in force in Upper Canada, because "it constitutes part of the criminal law of England, which we have adopted by an express statute, introducing it as it stood in England on the 17th September, 1792" (*w*).

In Regina v. Mercer (*x*), certain English Acts against the buying and selling of offices were considered (5 & 6 Edward VI. c. 16, and 49 Geo. III. c. 126). The latter Act it will be noticed, is of a date subsequent to 1792, and does not therefore fall within our present enquiry; it was however held to be of express colonial application, and there-

(*t*) Bank of U. C. v. Bethune, 4 U. C. Q. B. (O. S.) 165; see *ante*, p. 69.

(*u*) Since the above was written, the "Criminal Law" of Canada has been codified, and (it is understood) all necessity for reference to English criminal law obviated. As, however, the "criminal law" over which the Dominion parliament has legislative power, does not cover the whole field of penal legislation, what we have written may still be applicable in a few cases even in Ontario.

(*v*) 2 U. C. Q. B. 320.

(*w*) And see Purdy *q. t.* v. Ryder, Tay. 236.

(*x*) 17 U. C. Q. B. 602; see also Foote v. Bullock, 4 U. C. Q. B. 480, and Reg. v. Mood'e, 20 U. C. Q B. 580.

fore in force here. The Act of Edward VI. was unanimously held to be part of our law. Robinson, C.J., adverts to the distinction between the two provincial Acts, 32 Geo. III. and 40 Geo. III., in the following language:

"It is denied that this statute has any force in Upper Canada. If that point depended merely on the question whether it is included in our adoption of the law of England, under our statute 32 Geo. III. c. 1, ... a good deal might be urged against the application of the statute. . . . . It is more to the purpose, I think, to consider whether 5 & 6 Edward VI. c. 16, should not be held to be in force here under our adoption of the criminal law of England by 40 Geo. III. c. 1, which enacted that the criminal law of England as it stood on the 17th of September, 1792, shall be, and it was thereby declared to be, the criminal law of Upper Canada. I think it must be held that the statute formed part of the criminal law of England which was thus introduced."

McLean and Burns, JJ., were equally free from doubt.

So likewise, in a number of cases, the English Lottery Acts were held to be in force in Upper Canada; Cronyn v. Widder (*y*) being the leading case. Both in this case and Regina v. Mercer, above noted, it was urged that the statutes were not criminal statutes, but with the consideration which led the court in each instance to hold these Acts to be part of the criminal law of England, we have here nothing to do. It is more to our purpose to observe that having held them to be part of the English criminal law, the court applied them as part of the criminal law of Upper Canada, without entering upon any inquiry as to their adaptation or want of adaptation to the circumstances of Upper Canada.

And in Reid v. Inglis (*z*), Draper, C.J., speaking of the Act 1 Wm. & Mary, c. 18, "against disturbers of religious

(*y*) 16 U. C. Q. B. 356, and see Corby v. McDaniel, *ib.* 378. In earlier cases referred to in these, the Acts were not questioned.

(*z*) 12 U. C. C. P. 191.

meetings," said: "I see no reason for holding that the Act is not in force here;" from which we would infer that, in his opinion, all English criminal statutes in force in England in 1792, are *prima facie* in force here (*a*).

And now—even at the risk of a charge of undue repetition—we must again point out, that in any case, the question whether or not any particular British statute of date anterior to 1792, has the force of law in Ontario, will depend, in the first place, upon the absence of colonial legislation—Canadian or Provincial, as the case may be—on the subject matter involved. If there is none such, then the principles we have enumerated in the cases we have reviewed, will have to be considered, and may be summarized shortly by saying:

As to the criminal law, no question can arise, save the one question—Is the act one of general English application? If so, it is, in the absence always of colonial legislation, as above specified, part of our law under 40 Geo. III. c. 1.

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

It will be seen that, owing to the recognition by Upper Canadian judges of the propriety of making an inquiry as

(*a*) See Sheldon v. Law, 3 U. C. Q. B. (O. S.) 85, and Fulton v. James, 5 U. C. C. P. 182 (horse-racing); Reg. v. Milford, 20 O. R. 306 (9 Geo. II. c. 5, against fortune telling), and Reg. v. Barnes, 45 U. C. Q. B. 276 (Lord's Day Act).

to the applicability of any Imperial Act to the circumstances of this province, the principles upon which the decision must rest, in the case of any given statute, are the same (except as to criminal statutes) as those laid down in the decisions of the Nova Scotia and New Brunswick courts, and, as we shall hereafter see, the statutes by which this question is governed in the provinces more lately acquired, expressly make "applicability" the test of their introduction.

The English authorities upon this subject are sufficiently referred to in the extracts taken from the Canadian authorities. As pointed out by Chief Justice Halliburton, in Uniacke v. Dickson (*b*), those authorities lay down no very definite principle to guide colonial judges in coming to a decision in this very important matter; and, for this reason, we have gone more elaborately into the authorities in the older provinces than might seem necessary, so far as those older provinces alone are concerned: but, owing to the comparatively recent dates which have been fixed upon in the lately acquired provinces (*c*), as the date for the introduction of English law, the questions discussed in this chapter are certain to be of frequent occurrence in those provinces, and we, therefore, leave this chapter as originally written.

So far as the province of Ontario is concerned, the matter now stands:

As to the law relative to property and civil rights—upon R. S. O. (1887) c. 93, in which, after reciting 32 Geo. III. c. 1, the Legislative Assembly of Ontario enacts as follows:

"1. In all matters of controversy, relative to property and civil rights, resort shall continue to be had to the laws of England, as they stood on the said 15th day of October, 1792, as the rule for decision of the same, and all matters relative to testimony and legal proof in the investigation of fact, and the

(*b*) *Ante*, p. 78.

(*c*) *Post*, Chap. XIII. *et seq.*

forms thereof, in the several courts in Ontario, shall continue to be regulated by the rules of evidence established in England, as they existed on the day and year last aforesaid, except so far as the said laws and rules have been since repealed, altered, varied, modified, or affected by any Act of the Imperial parliament still having the force of law in Ontario; or by any Act of the late province of Upper Canada, or of the province of Canada, or of the province of Ontario, still having the force of law in Ontario, or by these revised statutes.

"2. The statutes of Jeofails, of limitations, and for the amendment of the law, excepting those of mere local expediency, which, previous to the 17th day of January, 1822, had been enacted respecting the laws of England, and then continued to be in force, shall be valid and effectual for the same purposes in Ontario, excepting so far as the same have, since the day last aforesaid, been repealed, altered, varied, modified, or affected in the manner mentioned in section 1 of this Act."

And as to the criminal law—upon R. S. C. (1886) c. 144, by section 1 of which it is enacted as follows:

"The criminal law of England, as it stood on the 17th day of September, in the year 1792, and as the same has since been repealed, altered, varied, modified, or affected by any Act of the parliament of the United Kingdom, having the force of law in the province of Ontario, or by any Act of the parliament of the late province of Upper Canada, or of the province of Canada, still having force of law, or by any Act of the parliament of Canada, shall be the criminal law of the province of Ontario."

QUEBEC.—The position of this province is so entirely unique, that reference to its legal system is of no aid in the other provinces. Its civil law (founded on the "*Code Civile*" of Napoleon) has since been recast into a provincial code, and no reference to English law is in order in that province in the sense we are now discussing. As to the criminal law, its recent codification obviates any further reference to it.